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# Maryland Reports.

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VOLUME XLVI.

THE  
JOURNAL  
OF  
THE  
ROYAL  
ANTHROPOLOGICAL  
INSTITUTE  
OF GREAT BRITAIN  
AND IRELAND  
PART I  
1906

THE  
JOURNAL  
OF  
THE  
ROYAL  
ANTHROPOLOGICAL  
INSTITUTE  
OF GREAT BRITAIN  
AND IRELAND  
PART II  
1906

REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
**Court of Appeals of Maryland.**

J. SHAAFF STOCKETT,  
STATE REPORTER.

VOL. XLVI.

CONTAINING CASES IN OCTOBER TERM, 1876, AND APRIL  
TERM, 1877.



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\*

## NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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### OF THE COURT OF APPEALS.

HON. JAMES LAWRENCE BARTOL, Chief Judge.  
HON. JAMES AUGUSTUS STEWART, Associate Judge.  
HON. JOHN MITCHELL ROBINSON, Associate Judge.  
HON. RICHARD GRASON, Associate Judge.  
HON. RICHARD HENRY ALVEY, Associate Judge.  
HON. OLIVER MILLER, Associate Judge.  
HON. RICHARD JOHNS BOWIE, Associate Judge.  
HON. GEORGE BRENT, Associate Judge.

### OF THE CIRCUIT COURTS.

**FIRST JUDICIAL CIRCUIT.**—*Worcester, Somerset, Dorchester and Wicomico*  
Counties.

HON. JAMES AUGUSTUS STEWART, Chief Judge.  
HON. JOHN R. FRANKLIN, Associate Judge.  
HON. LEVIN T. H. IRVING, Associate Judge.

**SECOND JUDICIAL CIRCUIT.**—*Caroline, Talbot, Queen Anne's, Kent and Cecil*  
Counties.

HON. JOHN MITCHELL ROBINSON, Chief Judge.  
HON. JOSEPH A. WICKES, Associate Judge.  
HON. FREDERICK STUMP, Associate Judge.

**THIRD JUDICIAL CIRCUIT.**—*Baltimore and Harford* Counties.

HON. RICHARD GRASON, Chief Judge.  
HON. GEORGE YELLOTT, Associate Judge.  
HON. JAMES D. WATTERS, Associate Judge.

**FOURTH JUDICIAL CIRCUIT.**—*Allegany, Garrett and Washington* Counties.

HON. RICHARD HENRY ALVEY, Chief Judge.  
HON. GEORGE A. PEARRE, Associate Judge.  
HON. WILLIAM MOTTER, Associate Judge.

FIFTH JUDICIAL CIRCUIT.—*Carroll, Howard and Anne Arundel Counties.*

HON. OLIVER MILLER, Chief Judge.  
 HON. EDWARD HAMMOND, Associate Judge.  
 HON. WILLIAM N. HAYDEN, Associate Judge.

SIXTH JUDICIAL CIRCUIT.—*Montgomery and Frederick Counties.*

HON. RICHARD JOHNS BOWIE, Chief Judge.  
 HON. JOHN A. LYNCH, Associate Judge.  
 HON. W. VEIRS BOUIC, Associate Judge.

SEVENTH JUDICIAL CIRCUIT.—*Prince George's, Charles, Calvert and St. Mary's Counties.*

HON. GEORGE BRENT, Chief Judge.  
 HON. ROBERT FORD, Associate Judge.  
 HON. DANIEL R. MAGRUDER, Associate Judge.

EIGHTH JUDICIAL CIRCUIT.—*Baltimore City.*

## THE SUPREME BENCH OF BALTIMORE CITY.

HON. GEORGE WILLIAM BROWN, Chief Judge.  
 HON. GEORGE W. DOBBIN, Associate Judge.  
 HON. HENRY F. GAREY, Associate Judge.  
 HON. CAMPBELL W. PINKNEY, Associate Judge.  
 HON. ROBERT GILMOR, JR., Associate Judge.

The Judges of the Supreme Bench are assigned to the following Courts:

SUPERIOR COURT.—HON. GEORGE W. DOBBIN, with HON. HENRY F. GAREY, to assist.

COURT OF COMMON PLEAS.—HON. HENRY F. GAREY, with HON. GEORGE W. DOBBIN, to assist.

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CIRCUIT COURT.—HON. ROBERT GILMOR, JR., with HON. CAMPBELL W. PINKNEY, to assist.

CRIMINAL COURT.—HON. GEORGE WILLIAM BROWN, with HON. ROBERT GILMOR, JR., to assist.

## ATTORNEY GENERAL.

CHARLES J. M. GWINN, Esq.

## CLERK.

JAMES S. FRANKLIN, Esq.



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THE COURT "NOT TO BE REPORTED."

FRAZIER, GEORGE H., *vs.* STATE OF MARYLAND. *The appeal in this case was taken to test the constitutionality and validity of the Act of Assembly of 1874, ch. 21, relating to the measurement of oysters in the shell, and the questions presented were raised on demurrer to, and motion to quash the indictment. The points raised were decided by this Court in the case of Patrick Mc Grath vs. State of Maryland, reported in this Volume, and for the reasons assigned in that case, the judgment was affirmed. No. 12, Special Docket, April Term, 1877. Recorded in Liber J. S. F., No. 2, folio 35, &c., of "Opinions Unreported."*

THE TALBOT COUNTY AGRICULTURAL SOCIETY *vs.* LEVIN WOOLFORD, COMPTROLLER OF THE TREASURY. *Mandamus under 2nd sec. of the Act of 1872, ch. 282. To the answer of the Comptroller, the plaintiff replied, and then a demurrer was entered to this replication. The Court decided that the petitioner had failed to show a sufficient compliance with the law to entitle the Society to the benefit of the law, and the decision below was sustained. No. 8, Special Docket, April Term, 1877. Recorded in Liber J. S. F., No. 2, folio 39, &c., of "Opinions Unreported."*

EAST, CALEB J., *vs.* JOHN J. YELLOTT, ASSIGNEE, &C. *Appeal from an order of the Circuit Court for Baltimore County, dissolving an injunction granted under secs. 15, 16 and 17 of Art. 64 of Code. The question is one depending entirely upon the proof, and the weight of the evidence being decidedly against appellant, the decree was affirmed for the reasons assigned by the Judge below. No. 78, General Docket, to April Term, 1877. Recorded in Liber J. S. F., No. 2, folio 36, &c., of "Opinions Unreported."*

SAMUEL J. LANAHAN, use of NISOR FRANK *vs.* WALTER E. HELLEN and WILLIAM D. HELLEN. *The appellant claimed as equitable assignee of the payee of a single bill secured by a mortgage, and on the proof in the case, the Court decided that the payee had never parted with his property in the single bill. No. 29, General Docket, to April Term, 1877. Recorded in Liber J. S. F., No. 2, folio 37, &c., of "Opinions Unreported."*

## CORRIGENDA.

- Page 3, 5th line, top, "*exacted*," for "*executed*."
- Page 43, 13th line, bottom, "*prosecuting*," for "*protecting*."
- Page 101, 7th line, top, "*if*," between "*that*" and "*they*."
- Page 102, 2nd line, top, "*appellee*," for "*appellants*."
- Page 104, 2nd line, top, "*was*," for "*were*."
- Page 129, 19th line, top, "*sections of*," for "*section, and of*."
- Page 161, last line, "*any*," for "*all*."
- Page 174, after "*Alvey*," insert "*Robinson*."
- Page 180, 2nd line, top, "*we*," after "*But*."
- Page 184, 16th line, top, "*prescribed*," for "*presented*."
- Page 224, 18th line, top, "*which*," after "*upon*."
- Page 343, 11th line, bottom, "*created*," for "*credited*."
- Page 416, 1st line, top, "*what*," after "*upon*."
- Page 417, 12th line, top, "*the*," to be omitted after "*under*."
- Page 418, 14th line, top, "*then*," for "*now*."
- Page 421, 12th line, top, "*remainders*," for "*remainder*."
- Page 471, 12th line, top, "*to*," for "*by*."
- Page 505, 16th line, top, "*taxes*," for "*those*."
- Page 505, 3rd line, bottom, "*record*," for "*second*."
- Page 508, 6th line, top, "*waiving*," for "*waving*."
- Page 533, 2nd line, bottom, "*case*," for "*sense*."
- Page 549, 3rd line, top, read "*priority*," for "*privity*."
- Page 550, 11th line, bottom, read "*sui*," for "*point*."
- Page 622, 5th line, bottom, read "*on*," instead of "*for*."

# MARYLAND REPORTS.

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OCTOBER TERM, A. D., 1876.

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## STATE OF MARYLAND vs. THE CONSOLIDATION COAL COMPANY.

*Scire facias against a Corporation for a forfeit of its Charter—How the authority to institute such proceeding may be conferred—Constitutional law—Construction of Act of Assembly—Effect of an unconstitutional provision in a Charter created by Act of Assembly—Question as to the power of a Corporation to convey its property and franchises by Deed without express authority to do so, and whether such authority is contained by implication in a power to purchase conferred upon the grantee under such Deed—The charge of excessive tolls by a Corporation, under a mistaken construction of its powers, no ground for a forfeiture of its Charter.*

While it is clear that proceedings by *scire facias*, or otherwise, against a corporation for the forfeiture of its charter, cannot be maintained, except by the sanction and authority of the Legislature, a special Act of Assembly for this purpose is not required.

It is competent for the Legislature, instead of passing a special Act authorizing such proceedings to be instituted in a particular case, by a general law to authorize suits for this purpose to be instituted at the instance of private parties, as was done by the Act of 1818, ch. 177, sec. 4, codified in Art. 12 of the Code; or to confer the power upon the Governor to cause the proceeding to be instituted in his discretion, whenever he may consider the



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The State *vs.* Consolidation Coal Company.

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public interests so require; and this power has been conferred by sec. 176 of the Act of 1868, ch. 471.

The Act of 1860, ch. 265, incorporating The Consolidation Coal Company, by its 6th section, conferred on said company the right to construct, locate and maintain such railroad or railroads as the Directors thereof might deem necessary for the convenient transaction of its business, and invested it with all the rights of *eminent domain* in the survey, location and construction of such railroads, which had been conferred upon the Baltimore and Ohio Railroad Company, by its Act of incorporation, 1826, ch. 123, or by any supplement thereto. Upon a proceeding by the State of Maryland to procure a forfeiture of the charter of said Consolidation Coal Company ;  
**Held :**

1st. That the Act of 1860, ch. 265, must be interpreted in connection with and in subordination to the provision contained in the Constitution of 1850, Art. 3, sec. 46, and also, in the Constitutions of 1864 and 1867, which declared that the Legislature should enact no law authorizing private property to be taken for public use, without just compensation being first paid or tendered ; and the charter of the Baltimore and Ohio Railroad Company to which it refers, must in this respect be construed as consistent with the Constitution, its words being clearly susceptible of such construction.

2nd. That if it were otherwise the particular provision would simply be inoperative, in so far as it might be inconsistent with the Constitution, but would not render the whole Act void.

The Cumberland and Pennsylvania Railroad Company was chartered by the Act of 1849, ch. 469. It was authorized to construct a railroad from Cumberland to some suitable point on the dividing line, between the States of Maryland and Pennsylvania, and to make lateral roads in any direction branching from its main line. By *sec. 21*, full right and privilege was reserved to citizens and corporations of the State to connect with said railroad, and by *sec. 22*, the Legislature reserved to *itself the right to alter, repeal or annul this Act at pleasure*. By its charter it was authorized to charge at specified rates for freight and passengers. By the Act of 1868, ch. 334, these rates were reduced. This amendment to the charter was accepted by the company, and it continued its business operations in accordance therewith till the spring of 1876, when the Legislature then in session, by the Act of 1876, ch. 64, amended the charter by a further reduction of the rates of charge. This Act was approved by the Governor on the 14th of March, 1876; while it was pending, a deed of the company dated March 2nd, 1876, was executed, conveying to the Consolidation Coal Company its railroad and all its property of every description, with its privileges and franchises ;

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and the latter company having taken charge and possession of the said railroad and property under the deed, continued to conduct the same as its own, claiming the right to charge for transportation thereon the rates allowed by its own charter, which were in excess of the rates allowed by the Act of 1876, ch. 64; and executed and received rates greater than those allowed by that Act. On a proceeding by the State to procure a forfeiture of the charter of the Consolidation Coal Company; **Held:**

- 1st. That the Cumberland and Pennsylvania Railroad Company was not authorized to execute said deed of the 2nd of March, 1876, without the consent of the Legislature.
- 2nd. That such consent was not contained in the charter of the Consolidation Coal Company, (1860, ch. 265,) by which the latter company was authorized "*to purchase, lease, hold and maintain any other railroad or railroads, or other roads or ways, water-courses or channels of transportation, already constructed or hereafter to be constructed, with all the rights, powers and franchises connected therewith.*"
- 3rd. That the said Act was not designed, nor can it be properly construed to be an amendment of the charter granted to the Cumberland and Pennsylvania Railroad Company, which alone must be looked at in order to ascertain what are the powers of the latter company.
- 4th. That the power to sell and convey all its property and franchises, and thus escape from its duties and obligations to the public, could only be conferred by the Legislature upon the Cumberland and Pennsylvania Railroad Company, and could not arise by implication from the provisions contained in the charter of the Consolidation Coal Company, which have reference only to the powers of the latter, and do not profess to confer any new powers upon other companies.
- 5th. That the deed of March 2nd, 1876, was inoperative and void, and passed no title to the grantee in the franchises, railroad and other property of the Cumberland and Pennsylvania Railroad Company, and the latter company continued to hold the same, notwithstanding the deed, and remained subject to the power of the Legislature to alter or amend its charter.
- 6th. That the Act of 1876, ch. 242, sec. 14, regulating the rates of transportation on railroads, has no application to the railroad of the Cumberland and Pennsylvania Railroad Company.
- 7th. That the Cumberland and Pennsylvania Railroad Company was still a subsisting corporation, vested with rights, franchises and property granted by and acquired under its charter, and subject to the power of the Legislature to regulate the rates to be charged for transportation upon its road.

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The State *vs.* Consolidation Coal Company.

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8th. That this power was exercised by the Act of 1876, ch. 64, and assuming that Act to be free from constitutional objection, it would follow that no rates in excess of those allowed by that Act could lawfully be charged for transportation on its road.

9th. That the alleged excessive rates exacted by the Consolidation Coal Company, while in charge of and carrying on the road, claiming to be owner under the deed, could not be construed as a violation of the charter of the latter, and therefore they furnished no sufficient cause for the forfeiture thereof.

APPEAL from the Circuit Court for Allegany County, in Equity.

The appellant, by its Attorney General, under authority of the Governor, filed its petition in the Court below, praying the Court to decree a forfeiture of the charter, corporate powers and franchises of the appellee, for the reasons stated in the petition.

The Court below, (PEARRE, J.,) gave judgment for the defendant upon certain demurrers filed by the petitioner and dismissed the said petition. The petitioner appealed.

The case is sufficiently stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., STEWART, GRASON, MILLER, ALVEY and ROBINSON, J.

*Attorney General Gwynn*, for the appellant.

*J. P. Poe, J. H. Gordon and Wm. Pinkney Whyte*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

This proceeding was instituted by the Attorney General under the authority of the Governor, to forfeit the charter of the appellee, for certain alleged abuses of its franchises and corporate powers. The power of the Governor to

The State vs. Consolidation Coal Company.

direct the proceeding is derived from the Act of 1868 ch. 471 sec. 176, known as the General Incorporation Act, which provides :

“Whenever the Attorney General of the State, or the State’s Attorney for the City of Baltimore, or for any County in this State, shall be authorized by the Governor to institute proceedings against any corporation incorporated under the laws of this State, to ascertain whether such corporation has been guilty of such misuse, abuse or nonuse of its corporate powers and franchises, as by law would authorize and make proper the forfeiture of its charter, corporate powers and franchises, the Attorney General, or State’s Attorney so authorized, shall file in the Court hereafter designated, a petition in the name of the State, setting forth fully and in detail the alleged abuse, misuse or nonuser; by reason whereof the said forfeiture is sought, &c., &c.”

While it is clear that proceedings by *scire facias*, or otherwise, against a corporation for the forfeiture of its charter, cannot be maintained except by the sanction and authority of the Legislature, a special Act of Assembly for this purpose is not required. It is competent for the Legislature, instead of passing a special Act authorizing such proceedings to be instituted in a particular case; by a general law, to authorize suits for this purpose to be instituted at the instance of private parties, as was done by the Act of 1818 ch. 177 sec. 4, codified in Article 12 of the Code; or to confer the power upon the Governor to cause the proceedings to be instituted, when in his discretion he may consider the public interests so require, and this power we think has been conferred by the 176th section of the Act of 1868. The objection made by the appellees, that this proceeding is without lawful authority is therefore overruled.

It has been contended on the part of the State, that the Act of 1860, ch. 265, incorporating the appellee, was not

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a valid and operative Act, and consequently that the appellee was never lawfully incorporated. The reason assigned for this position is, that the Act by its sixth section conferred on the appellee the right to locate, construct and maintain such railroad or railroads as the directors thereof might deem necessary for the convenient transaction of its business, and invested the appellee with all the rights of *eminent domain*, in the survey, location and construction of such railroads, which had been conferred upon the Baltimore and Ohio Railroad Co., by its Act of incorporation, 1826 ch. 123, or by any supplement thereto. It is argued that by this provision, power was attempted to be conferred upon the appellee, to enter upon land or property intended to be condemned, *as soon as it had been viewed by a jury*, and to occupy and use it for the construction and repair of its road, *without waiting for the proceedings of the jury upon such view, and without payment or tender of compensation to the owner of the land*. It being insisted that such power was conferred upon the Baltimore and Ohio Railroad Co., by its charter, such a power being inconsistent with the Constitution of 1850 Art. 3 sec. 46, which was in force when the Act of 1860 ch. 265 was passed, and which declared that the Legislature should enact no law authorizing private property to be taken for public use without just compensation as agreed upon between the parties or awarded by a jury, *being first paid or tendered*. The same provision is contained in the Constitutions of 1864 and 1867. Without stopping to inquire whether the charter of the Baltimore and Ohio Railroad Co. is in this respect fairly susceptible of the construction placed on it by the Attorney General, it is very clear that the Act of 1860 ch. 265, must be interpreted in connection with, and in subordination to the constitutional provision; and the charter of the Baltimore and Ohio Railroad Co. to which it refers, must in this respect, be construed as consistent with the Constitution,

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its words being clearly susceptible of such construction. If it were otherwise, the particular provision would simply be inoperative, in so far as it might be inconsistent with the Constitution, but would not render the whole Act void. *Davis vs. The State*, 7 Md., 151; *Mayor, &c. of Hagerstown vs Deckert*, 32 Md., 384. But in our opinion the Act of 1860 ch. 265, properly construed, is not liable to the objection urged against it by the Attorney General.

The next question to be considered is the validity of the deed of March 2nd 1876, by which the "Cumberland and Pennsylvania Railroad Company" sold and conveyed to the appellee, its railroad, property and franchises.

The Cumberland and Pennsylvania Railroad Company was chartered by the *Act of 1849 ch. 469*. It was authorized to construct a railroad from Cumberland to some suitable point on the dividing line between the States of Maryland and Pennsylvania, and to make lateral roads in any direction, branching from its main line. By *sec. 21* full right and privilege was reserved to citizens and corporations of the State to connect with said railroad, and by *sec. 22*, *the Legislature reserved to itself the right to alter, repeal or annul this Act at pleasure*. By the *Act of 1853 ch. 96*, it was authorized to connect with any existing railroad leading from Cumberland, at any point west of that town, and to construct a railroad from the place of such connection to the Pennsylvania line; or to purchase any such railroad, or any part thereof, and the lands, franchises and appurtenances held for the purposes of the same, and was given power to construct and build a connection from any railroad, or part of any railroad so purchased, from any point thereof west of Cumberland, to the Pennsylvania line. By the *Act of 1856 ch. 11*, it was authorized to construct an extension of its railroad from its *terminus* at the mines near Frostburg, in Allegany County, to such point or points in the valley of George's Creek, as lay north of the boundary line separating the

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lands of the George's Creek Coal and Iron Company from the lands known as the "Aspinwall Purchase," and was released from the duty of extending its road to the Pennsylvania line. By the *Act of 1860 ch. 78* it was authorized to extend its said railroad, or any of the branches thereof, to any mine or mines in the valley of George's Creek.

Under the *Act of 1853 ch. 96*, before referred to, it acquired the railroad of the Mount Savage Iron Company, and in October 1863, purchased the railroad of the George's Creek Coal and Iron Company; thus extending its railroad from Cumberland to Piedmont, through the coal region. This last purchase was confirmed by the Legislature, by the *Act of 1864 ch. 53*, and the Cumberland and Pennsylvania Railroad was authorized to hold, manage and control the railroad so purchased, with its appendages, &c., with the same rights, powers and franchises, as if the same had been acquired and constructed under its original charter and the supplements thereto.

By the original charter (1849 ch. 469) the Cumberland and Pennsylvania Railroad Company was authorized to charge *six cents per ton per mile* for tolls and transportation, and *three cents per mile* for each passenger. By the *Act of 1868 ch. 334* these rates were reduced, and the company was authorized to charge for tolls and transportation not more than *five cents per ton, per mile, when the distance of such transportation should not exceed five miles; four cents per ton, per mile, if the distance should be more than five miles and not more than ten miles; and three cents per ton, per mile, when the distance should exceed ten miles.*

This amendment to the charter was accepted by the company and it continued its business operations in accordance therewith till the spring of 1876; when the Legislature then in session, by the *Act of 1876 ch. 64*, amended the charter of the company, fixing the rates for toll and transportation at *four cents per ton per mile* where the dis-



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tance should not exceed *four miles; three cents per ton per mile*, for over *four* and not over *ten* miles, and *two cents per ton per mile* where the whole distance should exceed *ten miles*.

This Act was approved by the Governor on the 14th day of March 1876; while it was pending, the deed of the company, dated March 2nd 1876 was executed, conveying to the appellee, its railroad and all its property of every description with its privileges and franchises.

Was this deed valid and effectual for the purpose therein stated? No express power to make the deed has been conferred by the Legislature upon the Cumberland and Pennsylvania Railroad Company. Its charter is silent upon the subject; did it possess the power as inherent in it as owner, or incidental to the exercise of its corporate powers? No rule of law is better established than that a corporation, which derives its existence entirely from the Act of the Legislature can exercise no powers except such as are expressly conferred by its charter, and such as are necessarily incidental thereto, to enable it to accomplish the purposes of its creation.

This doctrine has been established by a long course of judicial decisions, and has been incorporated in the Legislation of the State. The Act of 1868 *ch. 471 sec. 51* declares that "no corporation, shall possess or exercise any corporate powers, except such as are conferred by law, and such as shall be necessary to the exercise of the powers so acquired," and by *sec. 216*, this provision is made "applicable to all corporations heretofore formed under the general laws of the State relating to corporations, or under any special law." This provision therefore applies to the Cumberland and Pennsylvania Railroad Company; but it in no respect changes the law, it is merely declaratory of the rule as it before existed. We think it may be considered as well settled that a corporation of this kind cannot voluntarily alien its franchises, or its property so as to dis-

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able itself from performing its duties and obligations to the public, without the authority of the Legislature. This doctrine is well settled in England, and the cases there are uniform. We refer to *Winch vs. Birkenhead R. Co.*, 16 *Jurist*, 1035; *Beman vs. Rufford*, 1 *Simon, N. S.*, 550; *South Yorkshire R. Co. vs. Great Northern R. Co.*, 3 *De G., M. & G.*, 576, (9 *Exch.*, 84;) *East Anglican R. Co. vs. Eastern Counties R.*, 11 *C. B.*, 75, (73 *Eng. C. L.*, 775;) *The Great Northern R. Co. vs. The Eastern Counties R. Co.*, 9 *Hare*, 306; *Shrewsbury, &c. R. Co. vs. North-Western R. Co.*, 6 *H. of L. Cases*, 113. In the case last cited (p. 136) the Chancellor quotes the language of Baron PARKE "that where a corporation is created by Act of Parliament for particular purposes with special powers, their deed, though under their corporate seal, does not bind them, if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactment, that the deed is *ultra vires*, that is that the Legislature meant that such a deed should not be made."

In this country there is some conflict in the decisions, as to the power of a railroad company to mortgage its property without legislative authority. In Maryland such a power has never been recognized by the Courts; and it is not necessary now to express any opinion thereon. But with respect to the voluntary and absolute alienation of its franchises and property, the great weight of the decisions in this country is against the existence of such a power. It has been repeatedly held that without legislative authority, a railroad company has no power to lease or alien its road and other property; many cases might be cited, we refer only to *The Troy & Rutland R. vs. Kerr*, 17 *Barbour*, 581; *York & Midland R. Co. vs. Winans*, 17 *Howard*, 39; *Commonwealth vs. Smith*, 10 *Allen*, 448; *Richardson vs. Sibley*, 11 *Allen*, 65; *Stewart & Foltz's Appeal*, 56 *Pa. R.*, 413; *Black vs. Del. & R.*

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*Canal Co.*, 22 N. J. Eq., 130, 399, where many cases are cited, and the same case on appeal 24 N. J., 455.

The reasons upon which these decisions rest are that corporations of this kind are *quasi* public in their nature, invested with large and important powers, and designed to subserve the public interests. *Rogers vs. Burlington*, 3 Wal., 663; *Olcott vs. the Supervisors*, 16 Wal., 695, and it is wholly inconsistent with the nature of the corporation, and subversive of the purposes of its creation, to concede to it the power of divesting itself at will of all its property, and thus escape its obligations to the public.

In speaking of this company, this Court said, "It is a general carrier of passengers and freights, and has the usual railroad powers and franchises, and is, of course, subject to the ordinary principles that govern common carriers of its class. One main object of its incorporation and construction was the facility it might afford to the development of the coal trade of that section of the State, and in which the State itself was, and is still, largely interested. It is now one of the main instrumentalities by which the coal trade of the Chesapeake and Ohio Canal is maintained, and its operation, therefore, is alike important to the coal companies and to the Chesapeake and Ohio Canal Company." *Lynn vs. Mt. Savage Iron Co., et al.*, 34 Md., 632.

Looking to the nature of this corporation, the objects and purposes of its creation, and to its powers and duties as defined in its charter, we are clearly of opinion that it was not authorized to execute the deed of March 2nd 1876 without the consent of the Legislature.

The appellee's counsel have argued that this consent is found in the charter of the *Consolidation Coal Company*, (1860 ch. 265) whereby it was authorized to construct and maintain such railroads as the directors may deem necessary for the convenient transaction of its business, and for the transportation of coal and other products of its

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mines and property to market; and was further authorized, *in lieu of* “*constructing any such railroad or railroads, or in addition thereto, to purchase, lease, hold and maintain any other railroad or railroads, or other roads or ways, water-courses or channels of transportation, already constructed or hereafter to be constructed, with all the rights, powers and franchises connected therewith.*” It has been contended that this power given to the appellee to purchase, carries with it by implication, a power to the Cumberland and Pennsylvania Railroad Company to sell; and as a consequence that a similar power to sell was thereby conferred, by implication, upon every other railroad or other transportation company in the State, from which the appellee might choose to buy. But in our judgment this position cannot be maintained. To constitute a valid sale and transfer, it is necessary not only that the purchaser should be legally competent to take, but also that the vendor should be clothed with the legal power and capacity to sell and convey the title. We have already said that the railroad company did not possess under its charter, without the consent of the Legislature the power or authority to execute the deed of March 2nd 1876. Its powers in this respect were not altered or enlarged by the provisions contained in the charter of the appellee. The Act of 1860 chartering the appellee, was not designed, nor can it be properly construed, to be an amendment of the charter granted to the Cumberland and Pennsylvania Railroad Company, to which alone we must look in order to ascertain what are the powers of the latter company. It would be contrary both to reason and authority, to imply from anything contained in the charter of the appellee, that the Legislature intended to authorize the Cumberland and Pennsylvania Railroad Company to sell and convey all its property and franchises, and to escape from its duties and obligations to the public. The power to do this could be conferred only by the Legislature upon the

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Cumberland and Pennsylvania Railroad Company, and cannot arise by implication from the provisions contained in the charter of the appellee, which have reference only to the powers, rights and duties of the latter, and do not profess to confer any new powers upon other companies. It follows from what has been said, that the deed of *March 2nd 1876* was inoperative and void, passed no title to the appellee in the franchises, railroad and other property of the Cumberland and Pennsylvania Railroad Company, and that the latter company continued to hold the same notwithstanding the deed, and remained subject to the power of the Legislature to alter or amend its charter.

We next inquire in what respect has the charter been altered or amended? It is clear that the *Act of 1876 ch. 64*, before referred to, so operated, it was passed for that purpose and in terms fixes the rates which the company would be entitled thereafter to demand for tolls and transportation on its road.

In our opinion the Act of 1876 ch. 242 sec. 14 regulating the rates of transportation on railroads, has no application to the railroad of the Cumberland and Pennsylvania Railroad Company. That section refers only to railroad companies incorporated under that Act, or which had been incorporated under the Act of 1870 ch. 476, for which it was a substitute.

The appellee having taken charge and possession of the Cumberland and Pennsylvania Company's railroad and all its property under the deed, has continued ever since to conduct the same as its own; claiming the right to charge for transportation thereon the rates allowed by its own charter, which are in excess of the rates allowed by the Act of 1876 ch. 64, and has exacted and received rates greater than those allowed by that Act. The causes of forfeiture alleged, are these illegal and excessive charges exacted and received by the appellee.

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The action of the appellee has been based upon the belief that the deed was valid, and that it acquired a good title to the railroad. It turns out that in this belief the appellee was in error.

The Cumberland and Pennsylvania Railroad Company is still a subsisting corporation, vested with the rights, franchises and property granted by and acquired under its charter, and subject to the power of the Legislature to regulate the rates to be charged for transportation upon its road. This power was exercised by the Legislature, by the Act of 1876 ch. 64, and assuming that Act to be free from constitutional objection, it would follow that no rates in excess of those allowed by that Act, could lawfully be charged for transportation on its road.

But the alleged excessive rates exacted by the appellee while in charge of, and carrying on the road, claiming to be owner under the deed, cannot be construed as a violation of the appellee's charter, and therefore they furnish no sufficient cause for the forfeiture thereof. Being clothed with large and extensive powers to purchase any railroads, the appellee might well have believed that its purchase from the Cumberland and Pennsylvania Company was valid. It is not charged in this case, that it acted fraudulently or in bad faith. The deed is invalid only because of the want of power in the railroad company to execute it. The acts of the appellee under it, if done in good faith are no cause of forfeiture of the charter of the appellee. The judgment of the Circuit Court must therefore be affirmed.

In the view we have taken of this case it becomes unnecessary to express our opinion upon the constitutionality of the Act of 1876 ch. 64, or to consider here the question, as to the supposed limitations upon the power of the Legislature to alter and amend the charter of the railroad company. That question has been argued both in this case, and in the appeal of the American Coal Com-

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pany against this appellee; it arises more properly in the latter case, and our opinion thereon will be expressed in disposing of that appeal.

*Judgment affirmed.*

(Decided 1st March, 1877.)

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THE AMERICAN COAL COMPANY *vs.* THE CONSOLIDATION COAL COMPANY and THE CUMBERLAND AND PENNSYLVANIA RAILROAD COMPANY.

*Corporation—Constitutional law—Question as to the right of the Legislature to reduce the tolls authorized to be charged by a Railroad Company under a charter containing a reservation of the right to alter, repeal or annul—Injunction to restrain the charge of excessive tolls.*

Where in the original charter of a Railroad Company the Legislature expressly reserved the power to alter, repeal or annul the charter at pleasure, the question whether a proposed amendment of the charter is wise or consistent with the public interests and with the prosperity of the company, is one which by the charter is made to depend upon the wisdom and discretion of the Legislature, and is not a question to be determined by the Courts.

This construction of the terms of the charter is part of the contract, and all parties dealing with the company, acquire and hold their rights, subject to the reserved power of the Legislature, to alter, repeal or annul the charter at its pleasure.

And the Court cannot presume that the power will be exercised by the Legislature arbitrarily or unjustly.

In the original charter of the Cumberland and Pennsylvania Railroad Company, the Legislature expressly reserved the power to alter, repeal or annul the charter at pleasure. By the Act of 1876, ch. 64, modified by the Act of 1876, ch. 80, the rates of toll authorized to be charged by said company were reduced. **HOLD:**



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That the Act of 1876, ch. 64, was a constitutional and valid law, and that the railroad company could not lawfully exact or receive higher rates for transportation than that Act provides. And that the Act of 1876, ch. 80, was also free from constitutional objections.

On a bill filed by the American Coal Company against said railroad company, for an injunction, prohibiting the latter from demanding or receiving from the complainant higher rates for transporting coal over the road of the defendant, than were fixed and prescribed by the said Act of 1876, ch. 64, it appeared that the complainant, which was a coal mining company, with its tram-road connecting with the railroad of the defendant, and depending entirely upon the latter for the means of transporting its coal to market, was specially damaged by the illegal exactions by the defendant of excessive freights. **HELD:**

That the complainant was entitled to an injunction as prayed.

**APPEAL** from the Circuit Court for Allegany County.

The case is sufficiently stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., STEWART, GRASON, MILLER, ALVEY and ROBINSON, J.

*Wm. Walsh* and *Thomas J. McKaig*, for the appellant.

The objection that the Act of 1876, altering the rates, does not bind the railroad, without the consent of the corporation, is wholly untenable. The charter reserves the right to the Legislature to alter, amend, or repeal at its pleasure, and the contract is that the corporation has already consented in advance, to any alteration or amendment that may be made within the general scope of the reserved power. And all parties having derivative interests under the corporation as lessees, mortgagees, creditors, &c., have notice of the terms of the charter in law, and take their rights subject to the power of the Legislature. It would be absurd to reserve the power, and let the corporation evade it by contracting a debt. One of the most

obvious reasons for which the right is reserved is to compel an unwilling corporation to perfect and extend its connections, to regulate its charges, &c., so as to accommodate the public interest as circumstances may require from time to time. The tolls and rates for transportation may be limited under such a reservation. *Mayor, &c. vs. Norwich & Worcester R. R.*, 109 *Mass.*, 103; *Olcott vs. The Supervisors*, 16 *Wall.*, 678, 694; *Pa. College Cases*, 13 *Wall.*, 190; *Zabriskie vs. Hackensack & N. Y. R. R. Co.*, 6 *Am. Law Rep. N. S.*, 421; *Sherman vs. Smith*, 1 *Black, U. S.*, 587; *Com. vs. Fayette Co. R. R.*, 55 *Pa. St.*, 452; *Oliver Lee & Co. vs. Bank*, 7 *Smith N. Y.*, 9; *Baily vs. Hollister*, 26 *N. Y.*, 112; *Hyatt vs. McMahon*, 25 *Barb.*, 457; *Stevens vs. Smith*, 29 *Vermt.*, 160; *Pratt vs. Brown*, 3 *Wis.*, 603; *Kenoho R. R. vs. Marsh*, 17 *Wis.*, 13; *Whiting vs. Fondulac R. R. Co.*, 25 *Wis.*, 570; *Atty. Gen. vs. R. R. Co.*, 35 *Wis.*, 425.

The remedy of injunction on final hearing lies for any party specially injured by this illegal combination between the appellees complained of. The wrong is repeated and continuing, and the damages can only be estimated by conjecture in some respects; and where they can be estimated, the remedy at law is doubtful, at least in Maryland, where the Court has said that excessive freight charges, even if paid under protest, cannot be recovered back; and the appellees are corporations deriving their powers from statutory grants, and exceeding them. *Hodges on Railroads*, 3rd ed., p. 751; *Perrine vs. Del. & Ches. C. Co.*, 9 *How.*, 172; *Campbell, et al. vs. M. & C. R. R. Co.*, 23 *Ohio St.*, 168; *Danford vs. Railroad Co.*, 24 *Pa. St.*, 378; *Com'r vs. Erie & N. E. R. Co.*, 27 *Pa. St.*, 339; *W. & F. R. R. Co. vs. Clarion, &c.*, 54 *Pa. St.*, 28; *Baxendale vs. North Devon R. Co.*, 3 *C. B., N. S.*, 324; *Baxendale vs. Great Western R. R. Co.*, 5 *C. B., N. S.*, 309; *Pickford vs. Grand Junct. R. R. Co.*, 3 *Ra. Cas.*, 538; *Mayor, &c. vs. Chorby Water Works*, 2 *De Gex, M. & G.* 860;

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*Thompson vs. N. & H. R. R. Co.*, 3 *Sandf. Ch.*, 653; *Rogers' Locomotive Works vs. Erie, &c.*, 5 *C. E. Green*, 379; *Cornings vs. Troy*, 40 *N. Y.*, 191; *Ewell vs. Greenwood*, 26 *Iowa*, 377; *Green vs. Oakes*, 17 *Ill.*, 247; *Craig vs. People*, 47 *Id.*, 47; *Vincent vs. Chicago, &c.*, 49 *Id.*, 33; *Smith vs. Lockwood*, 13 *Barb.*, 209; *Attorney General vs. Johnson*, 2 *Wils. Ch.*, 87; *Attorney General vs. Forbes*, 2 *M. & Cr.*, 123.

*John P. Poe, J. H. Gordon and Wm. Pinkney Whyte*, for the appellees.

The complainant has stated no sufficient ground of action against the defendants or either of them, because the injury complained of, if a wrong at all, is a public grievance, from which the complainant does not, upon its own showing, suffer any special and particular damage, different not merely in degree, but also in kind, from that experienced in common with other citizens—and that, therefore, according to settled principles of law, such grievance can only be remedied by a direct proceeding on the part of the State, and not by private action, either at law or in equity. *Irvin vs. Dixon*, 9 *Howard*, 27, and cases there cited; *Houck vs. Wachter*, 34 *Md.*, 265; *Buck Mountain Coal Co vs. Lehigh Nav. Co.*, 50 *Penna. State Rep.*, 91; *Morris & Essex R. R. Co. vs. Prudden*, 20 *New Jers. Eq.*, 537.

Even if the grievance complained of is one for which a private action by an individual might be maintained, the complainant has a plain, complete and adequate remedy at law, and that no such irreparable damage is averred or proved, as is necessary to be shown, in order to justify the intervention of a Court of Equity. *Irvin vs. Dixon*, 9 *Howard*, 27; *Banks vs. Busey*, 34 *Md.*, 439; *Rogers Loc. & M. Co. vs. Erie Railway Co.*, 20 *N. J.*, (*Eq.*) 379; *Amelung vs. Seekamp*, 9 *G & J.*, 468.

The Acts of 1876, ch. 64 and ch. 80, upon which the appellant's case depends, are unconstitutional and void.

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a. Because they impair the obligation of contracts.

b. Because they deprive the bondholders and stockholders of the Cumberland and Pennsylvania Railroad Company of their property, without due process of law.

c. Because they take private property for public use, not only without just compensation, but without any compensation whatever. *Dartmouth College vs. Woodward*, 4 Wheaton, 515; *Wilmington R. R. Co. vs. Reid*, 13 Wall., 226; *Holyoke Co. vs. Lyman*, 15 Wall., 511; *Humphrey vs. Pegues*, 16 Wall., 247; *Pac. R. R. Co. vs. Maguire*, 20 Wall., 42; *Sage vs. Dillard*, 15 B. Monroe, 353; *Commonwealth vs. Essex Co.*, 13 Grey, 253; *Commissioners vs. Holyoke Co.*, 104 Mass., 451; *Allen vs. McKean*, 1 Sumner, 277; *Miller vs. Railroad Co.*, 21 Barb., 517; *State vs. Adams*, 44 Mo., 570; *Zabriskie vs. Railroad Co.*, 3 C. E. Green, 180; *Railroad Co. vs. Veazie*, 39 Maine, 572; *Yeaton vs. Bank of Old Dominion*, 21 Grattan, 593; *Bronson vs. Kinzie*, 1 Howard, 311; *Woodruff vs. Trapnell*, 10 Howard, 190; *Carran vs. Arkansas*, 15 Howard, 304; *McCrackan vs. Hayward*, 2 Howard, 608; *Hawthorn vs. Calef*, 2 Wallace, 10; *Von Hoffman vs. Quincey*, 4 Wallace, 458; *Tomlinson vs. Jessop*, 15 Wallace, 457; *Barings vs. Dabney*, 19 Wallace, 8; *Fletcher vs. Peck*, 6 Cranch, 87; *Durfee vs. Old Colony*, 5 Allen, 247; *Green vs. Biddle*, 8 Wheaton, 84; *West River Bridge vs. Dix*, 6 Howard, 516; *Pumpelly vs. Green Bay Co.*, 13 Wallace, 166; *Balt. & Pot. R. R. Co. vs. Reaney*, 42 Md., 133; *Wynehamer vs. The People*, 13 New York, 392; *State Freight Tax Case*, 15 Wall., 278; *State vs. Cumb. & Penna. R. R. Co.*, 40 Md., 46; *Boyle vs. Phila. & Read. R. R. Co.*, 54 Penna. St. Rep., 310; *Bardstown & Louisville R. R. Co. vs. Metcalf*, 4 Met., (Ky.) 208; *Bank vs. Egerton*, 30 Vermont, 182; *Beardsley vs. Ontario Bank*, 31 Barb., 625; *Hall vs. Sullivan R. R. Co.*, 22 Law Rep., 138; *Troy, &c. R. R. Co. vs. Kerr*, 17 Barb., 581.

Whatever the law may be elsewhere, in Maryland at least, it must be regarded as settled, since the decision in

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*Houck vs. Wachter*, 34 Md., 265, that the obstruction of a highway is a *common* nuisance, and being a wrong of a public nature, the remedy is by indictment. It is not in itself the ground of an action by an individual, unless he has suffered from it some special and particular damage, different not merely in degree, but different also in kind, from that experienced in common with other citizens. *Irwin vs. Dixon*, 9 Howard, 10; (See cases cited in Court's opinion, 27, 28;) *Buck Mountain Coal Co. vs. Lehigh Coal & Navigation Co.*, 50 Pa. State Rep., 91

To authorize the intervention of a Court of equity in applications for injunctions, the settled rule in Maryland is, that the bill must show a cause of irreparable injury, and the facts must be stated, so that the Court may judge whether the wrong is irreparable except by means of the specific relief prayed. If the injury is capable of other adequate redress, then equity has no jurisdiction. For this principle, no array of authorities need be cited.

*Amelung vs. Seekamp*, 9 G. & J., 468, has always been followed as the leading case in Maryland on the subject.

(Other points were discussed at length on both sides, but are omitted, the same not having been passed upon in this case.—REPORTER.)

BARTOL C. J., delivered the opinion of the Court.

The bill of complaint in this case was filed by the appellant, and prays that the appellees may be enjoined and prohibited from demanding or receiving from the appellant higher rates for transporting coal over the road of the Cumberland and Pennsylvania Railroad Company, than are fixed and prescribed by the *Act of 1876, ch. 64*. Some of the questions involved in this appeal are the same as those which have been considered in the case of *The State vs. The Consolidation Coal Company*, at the present term; and the decision of that case in a great measure governs and concludes this.

We have there decided.

1st. That the deed dated March 2nd 1876, from the Cumberland and Pennsylvania Railroad Company to the Consolidation Coal Company, was inoperative and void, for the want of power and authority in the railroad company under its charter to make it.

2nd. That the latter is a subsisting corporation, vested with the title to its franchises and property, and charged with the performance of its duties and obligations to the public, in the same manner as if the deed had not been executed.

3rd. That under the reservation in the act of incorporation, the Legislature has the power to alter or amend the charter of the company, and that the *Act of 1876, ch. 64*, was passed in the exercise of that power and is valid, unless for the reasons assigned by the appellees in this case it is unconstitutional.

The question of the constitutionality of the Act was not passed upon in the case of the *State vs. The Consolidation Coal Company*. In this case the constitutionality of that Act and of the Act of 1876, ch. 80, is assailed by the appellee upon the alleged ground that they are laws impairing the obligation of a contract, prohibited by the Constitution of the United States, and because they are alleged to be repugnant to the provision of the same Constitution, which declares that no State shall deprive any person of life, liberty or property without due process of law, and it is further alleged that they are in violation both of the Constitution of this State and of the United States, which forbid private property to be taken for public use without just compensation.

These objections are based on the alleged fact, that the reduction of the rates of toll and prices of transportation on the railroad prescribed by the Act of 1876, ch. 64, is unjust and unreasonable, and would operate, if enforced, to diminish the revenue and receipts of the company to

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such an extent, as would be most disastrous to the company, and would prevent it from maintaining the road in a complete, and thorough condition of efficiency and repair, so as to perform its obligations to the public, pay interest on its large bonded debt, and return a fair and proper dividend to its stockholders. It is argued that the power of amending the charter reserved by the Legislature, must be construed as limited by the above considerations, and that the question of what are reasonable rates for transportation is not one to be determined by the Legislature, but is a judicial question to be decided by the Court.

The question of the limitation on the power of the Legislature, under a reservation such as that contained in the charter of the Cumberland and Pennsylvania Railroad Company, is one of much interest and importance. It is now pending before the Supreme Court of the United States, but has not yet been decided. In the absence of a decision by that Court of last resort, we are compelled to express our opinion upon it, as it is presented by the record, and is essential to the determination of the present appeal. In the original charter of the railroad company the Legislature expressly reserved the power to alter, repeal or annul the charter at its pleasure.

Under this provision, it seems to us, that the question whether a proposed amendment of the charter is wise, or consistent with the public interests, and with the prosperity of the company, is one which, by the charter, is made to depend upon the wisdom and discretion of the Legislature, and is not a question to be determined by the Courts. Such in our opinion is the true construction of the terms of the charter.

It is part of the contract, and all parties dealing with the company acquire and hold their rights, subject to the reserved power of the Legislature to "*alter, repeal or annul the charter at its pleasure.*"

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The Court cannot presume that the power will be exercised by the Legislature arbitrarily or unjustly.

It follows that in our opinion the Act of 1876, ch. 64, is a constitutional and valid law, and that the railroad company cannot lawfully exact, or receive higher rates for transportation than that Act prescribes.

And for the same reasons we think the Act of 1876, ch. 80, is free from constitutional objections.

The decision of these questions determines the legal rights of the parties in this case. It only remains to consider whether the appellant is entitled to relief by injunction as prayed, and of this we think there can be little question or doubt. It is said by the appellees that the grievance complained of is of a public nature; but it clearly appears that the appellant, which is a coal mining company, with its tram-road connecting with the railroad of the appellee and depending entirely upon the latter, for the means of transporting its coal to market, is specially damaged by the illegal exactions by the railroad company of excessive freights. This grievance is constantly occurring, and there is no adequate remedy at law. It has been decided that excessive freight charges, even if paid under protest, cannot be recovered back. *Potomac Coal Co. vs. The Cumberland and Pennsylvania Railroad Co.*, 38 Md., 226. Several authorities have been cited by the appellant in support of the jurisdiction of a Court of equity to grant relief in cases of this kind; but without referring to them more particularly, we think it very clear that the injunction ought to be issued as prayed. To that end the *pro forma* decree of the Circuit Court will be reversed and the cause remanded.

*Reversed and remanded.*

(Decided 1st March, 1877.)



RICHARD A. EDES, and others vs. HENRY F. GAREY  
and THOMAS M. LANAHAN, surviving obligors of  
THOMAS J. CARSON.

*Executor and trustee—Remedy against sureties for devastavit  
Committed by an Executor—Jurisdiction of Orphans'  
Court—Notice—Estoppel—Equity pleadings.*

Although an executor strictly speaking may be considered as a trustee, and as such may be held accountable in a Court of equity for a proper administration of the trust, yet it is clear that the sureties maintain no such relation. On the contrary, their obligation being one of contract, the remedy for a breach of it must, as a general rule, be by an action at law on the bond.

If there be any exception to this general rule, there must be *special and peculiar circumstances*, making the exercise of jurisdiction necessary to the protection of the rights and interests of parties.

Under the will of E., C. was appointed both executor and trustee. On a bill in equity against the sureties on the bond given by C. as executor, it was alleged that as executor C. received large sums of money belonging to the estate, which by his act were wholly lost and wasted. That the Orphans' Court upon his application passed an order directing him to transfer to himself, as trustee under the will, the amount remaining in his hands as executor. That under the will it was his duty as executor to have kept together said estate until the death of the testator's mother, a contingency which had not happened when said order was passed; that the order was *ex parte*, and never in fact and in good faith complied with by C., nor was any security given by him for the money thus unlawfully directed to be transferred to himself as trustee, except an *unrecorded conveyance of certain lots of ground in the City of Baltimore to himself as trustee for the parties in interest under the will*, which was found among his papers after his death. That under a creditor's bill subsequently filed by the creditors of C., these lots were sold and the proceeds of sale brought into Court for distribution, and the complainants came in by petition in that case claiming as general creditors of C., and also *claiming under said unrecorded deed to himself as trustee, a specific lien upon the proceeds of the sale of said lots of ground.*

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That the specific lien thus claimed was allowed by the Court, and the entire net proceeds of said sale was under the order of the Court paid to them. And that the defendants had personal knowledge of the above matters from having been the counsel of C. as executor and trustee, and especially advising him in regard to said transactions. **HELD:**

- 1st. That the above allegations when considered separately or together present nothing more or less than an ordinary case of a *devastavit* by an executor, for which the complainants had a *plain, adequate and complete remedy at law*.
  - 2nd. That there was not a particle of evidence necessary to prove either one or all of the material facts averred in the bill, but what could be offered in a Court of law, and upon the facts thus established, it was within the province of a jury under instructions from the Court to have determined the rights and liabilities of the parties.
  - 3rd. That the death of C. the executor, in no manner affected the liability of his sureties as surviving obligors in an action at law.
  - 4th. That there was nothing in the record to justify the jurisdiction of a Court of equity, upon the ground of complication of accounts, or mutual and adverse claims, or controlling equities.
  - 5th. That under the facts and circumstances disclosed by the record the complainants were precluded from recovering against the defendants as sureties of C.
  - 6th. That the order of the Orphans' Court, directing C. to transfer to himself as trustee, under the will, the amount remaining in his hands as executor, was passed by a Court having the jurisdiction of subject-matter, and the complainants as parties in interest under the will are presumed to have had notice of it.
  - 7th. That common sense and common justice require that, having claimed and having received the entire proceeds from the sale of the property conveyed by the unrecorded deed upon the express ground, that it was executed by C. to secure the complainants on account of the money belonging to them, and which he held as trustee under the will, they should not be permitted to deny those facts in a suit brought against the sureties on the administration bond.
- A defendant may demur to part of the bill and answer the rest, provided the demurrer and answer apply to different and distinct parts of the bill, and be not inconsistent with each other.

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APPEAL from the Circuit Court of Baltimore City.

The nature of the bill in this case is sufficiently stated in the opinion of the Court; see also, the cases of *Pairo vs. Vickery*, 37 Md., 467, and *Carson vs. Phelps, Trustee*, 40 Md., 73.

The defendants demurred, 1st, Generally; 2nd, To the jurisdiction; 3rd, For want of proper parties; and also made answer to such part of the bill as alleges as follows:

"Of all which premises the defendants have personal knowledge, having been of counsel for said Carson, and especially advising him relative to the transactions, deeds, mortgages, accounts and order hereinbefore mentioned—which said alleged order was passed on the alleged application of said Carson on their advice."

Which allegation they denied.

The demurrer having been sustained by the Court, (BROWN and PINKNEY, J.,) a replication was filed and testimony taken by the complainants. After which the Court below, (BROWN and PINKNEY, J.,) passed a decree dismissing the bill.

The complainants appealed.

The cause was argued before BARTOL, C. J., STEWART, GRASON, ALVEY and ROBINSON, J.

*John P. Poe* and *Charles E. Phelps*, for the appellants.

The Court below erred in first denying the jurisdiction of equity by ignoring special circumstances, which embarrassed the legal remedy, and then using those very circumstances as if the case were in a Court of law, to defeat the complainants upon the merits. It also erred in ignoring all the testimony in support of material allegations in the bill denied by the answer, although not excepted to, nor contradicted.

There is no real repugnance between the present claim for the balance due upon the bond, and the previous par-

tial recovery in the creditors' suit. It is clear that Carson, upon obtaining the order of the Orphans' Court, and passing the final account of 8th May, 1867, had *not*, by means of this merely formal and paper transfer, effected the discharge of himself and his sureties, from their existing liability already fixed by the previous *devastavit*, that he had *not* divested the right of action on the bond then vested in the legatees by condition broken, that he had *not* duly and in good faith, transferred the fund supposed to be in his hands as executor, to himself as trustee, and had in nowise relieved himself of the duty of making *real restitution* of the assets which he had unlawfully abstracted, and for which he still continued a *defaulting executor*, indebted to the estate of Edes. *Seegar vs. State*. 6 H. & J., 166; *Smith vs. Gregory*, 26 Grat., 248; *Conkey vs. Dickinson*, 13 Met., 54; *Ordinary vs. Shelton*. 3 McCord, 412; *State vs. Reany*, 13 Md., 236. This restitution could only be made by some act amounting to an identification of the trust fund, by ear-marking, or investing in property of equivalent value. So far from his being relieved of this obligation, by his *ex parte* proceedings in the Orphans' Court, he had on the contrary, reinforced that obligation. 1st, by the exigency of the order itself, which being in terms *prospective*, and Carson being at the time a *defaulting executor* who had wasted the whole of the assets, could only be gratified by a *bona fide* and substantial compliance, and 2nd, by the mandatory provisions of the statute requiring *security*. *Code*, Art. 93, sec. 10; *Newcomb vs. Williams*, 9 Met., 534; *Prior vs. Talbot*, 10 Cush., 1. Being thus under an express unsatisfied obligation to make a *substantial transfer* from himself as executor, to himself as trustee, at the time he executed to himself as trustee, the deed of 1868, the case comes within the equitable principle, that *where a man is bound to do an act, and he does one which is capable of being construed to have been done in fulfillment of his obligation it*

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*shall be so construed, and that either by way of performance or part-performance according to its extent. Smith's Man. Eq., 28, 29, and cases cited.*

The deed being a valid, equitable security, although unrecorded, was a restitution and a reduction of damage *pro tanto*, and *quo ad* the fund actually secured by it, and finally realized from it, was a substantial compliance with the order of the Orphans' Court, and completed the transfer *pro tanto*. Here was a part of the fund restored and identified, and *as to that part*, Carson was in possession *as trustee*, under the order thus partially complied with, while *as to the balance*, he was still a *defaulting executor*, indebted to the estate, bound to make restitution, and liable on the breach of condition. As to *this balance*, the order still continued operative, and unsatisfied, and the sureties of course equally bound with their principal. The litigation in the previous creditors' suit was confined to the proceeds of sale of the real estate secured by that deed, and especially limited to a contract between the two auditor's accounts distributing those proceeds, 40 *Md.*, 95; while the litigation in this suit, is confined to the unsecured floating balance of the debt due by Carson, *as executor*, outside of the security of that deed, and beyond the range of those accounts.

There is therefore no blowing hot and cold between the two proceedings, and the apparent inconsistency disappears the moment they are critically analyzed and compared.

The general rule recognized in 40 *Md.*, 98, (top,) is not denied here, nor the application of that rule to the subject-matter then before the Court. Where the same person is both executor and trustee, and an order of the Orphans' Court, directs him to transfer the fund in his hands as executor, there is no doubt of the general rule that, after that he is in possession as trustee. The *qualification* of that rule is, that the rule ceases to operate where there is

*nothing for it to operate upon, and where its operation is arrested by the intervention of vested rights in third parties, as in the case of a completed previous devastavit.*

The limitation to that again, is, that *where* the *devastavit* has been purged either in full or in part, and the intervening rights satisfied, either in whole or in part, the transfer will operate to *the extent* of the restitution. In 40 *Md.*, 73, such partial restitution had been made, the resulting proceeds were in Court, and it *was with respect to those proceeds* that the Court properly held the rule operative and the transfer effected. But the Court was not asked to go further, and consider all the qualifications and limitations of the rule in its application to another and different subject-matter. If the Court had been asked to do so, it would probably have replied that it had quite enough to do, without listening to moot points.

Indeed, but for the objection of *multifariousness*, the sureties could have been made parties in the creditors' suit, and an account taken and decree passed against them for the balance due upon the bond, and that in the same decree which allowed the claim under the deed. *State vs. Digges*, 21 *Md.*, 243.

Identically the same result which but for multifariousness, might have been reached in one suit, it is now proposed to attain as the combined result of two successive suits.

There is no foundation for the charge that other creditors were prejudiced, much less defrauded by the lien claimed and allowed in the prior suit, since the case was not one for a *marshaling of securities*, and it was wholly immaterial to the general creditors, whether the preferred creditors had a further and ultimate security beyond their reach, in the shape of an action for unliquidated damages, and they could not have resisted the enforcement of the lien in any event, since the deed was based upon an unquestionably valuable consideration, to wit: the *existing*

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*indebtedness.* *Alexander vs. Ghiselin*, 5 Gill, 185; *Exton vs. Scott*, 6 Sim., 39.

The sureties' right of *subrogation*, which the legatees were enforcing for the benefit of the sureties as well as their own, was a *paramount equity* which the other creditors could not defeat or impair. *Franer vs. Yingling*, 37 Md., 498; 2 Am. Lea. Ca., 402, 458, 477.

But the estoppel set up may be disposed of upon other and well settled principles: 1. *Want of mutuality.* The appellees not being themselves concluded by the former proceedings, *Iglehart vs. State*, 2 G. & J., 245, and having been in no way prejudiced but benefited thereby, the attempt to estop with them is against all principle and precedent. *Alexander vs. Walter*, 8 Gill, 239; *Homer vs. Grosholz*, 38 Md., 525; *Bramble vs. Twilley*, 41 Md., 435.

2. *Want of certainty.* In such estoppels nothing is to be taken by argument or inference. There must be *certainty to a certain intent in every particular.* *Sto. Eq. Plea.*, sec. 240; *C. Litt.*, 303 a, 352 b.

The petition in the creditors' suit contains no allegations that can be squared with this requirement, even if their effect can be extended beyond the fund in controversy in that suit, to a suit between different parties and for a different subject-matter. But whatever construction may be put upon them, it is well settled that such averments are not conclusive in another proceeding. 1 *Tay. Ev.*, secs. 745, 746, 786; 2 *Tay. Ev.*, sec. 1560, and cases cited.

3. Partial satisfaction under a decree is no bar to further remedies for the *unsatisfied balance.* *Loney vs. Bailey*, 43 Md., 22; 7 Rob. Prac., 432.

In further support of the *jurisdiction*, it was argued by the appellants' counsel that the case was distinguished from ordinary suits on testamentary bond, by a variety of special and peculiar circumstances, which they referred to in detail under several topics, viz: complicity of accounts; appropriation of payments; subrogation; trust; accident;

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constructive fraud; marshaling of assets; marshaling of securities; suretyship; solicitor. *Brooks vs. Brooks*, 12 G. & J., 306; *Spottswood vs. Dandridge*, 4 Munf., 289; *Carow vs. Mowatt*, 2 Edes. Ch., 57; *Moore vs. Armstrong*, 9 Peters, 697; *State vs. Diggs*, 21 Md., 240; *Thurston vs. Blackiston*, 36 Md., 501; *Flickinger vs. Hull*, 5 Gill, 60; *Barnes vs. Compton*, 8 Gill, 392.

There has been no relaxation in Maryland of the strict rule of chancery practice applicable to *demurrers*, which are discouraged by our Courts. *Alex. Ch. Prac.*, 58; *Mewshaw vs. Mewshaw*, 2 Md. Ch., 14; *Sto. Eq. Plea.*, sec. 454.

The demurrer in this case not clearly expressing the particular parts of the bill which it was designed to cover, *is overruled by the answer*. *Story's Eq. Plea.*, secs. 457, 458. If not overruled by the answer it can only be because the demurrer is held not to be a defence to that part of the bill answered. But the answer being in great part overthrown by the proof, and the allegations of the bill traversed being material, supported by testimony, and left without defence, the rule applies that a defence, whatever its form, must profess to be a *defence to the whole bill*, and the demurrer must therefore be overruled. *Alex. Ch. Prac.*, 57. In either case there is nothing left upon the record which objects to the jurisdiction. *Knight vs. Brawner*, 14 Md., 1.

The defendants should at all events have denied, (if they could,) the allegation in the bill that the exigency of the order of the Orphans' Court "*was never in fact and substance, and in good faith complied with,*" and also the allegation, that "*said order was not complied with by said Carson, except colorably and on paper, by a mere fictitious entry on his books.*" These admissions have clearly let in equity. *Kerr on Frauds*, (*Am. Ed.*.) 360-8, and cases cited.



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*Orville Horwitz* and *I. Nevett Steele*, for the appellees.

The provisions of the will, with the final settlement by the executor, and the order of May 8th, 1867, by the Orphans' Court, directing Carson, executor, to pay over the money in his hands to himself as trustee, and his final settlement under said order, released the defendants from liability on the bond.

The statements made in the bill for the purpose of avoiding this order of 1867, are not sufficient for that purpose. No previous *devastavit* or contemporaneous insolvency being alleged or set out in the bill.

It is only charged that Carson mixed the money of the estate with his own, and lost or did not account for *that specific money*. No insolvency is charged upon Carson until the 11th of May, 1869, when they say "Carson died greatly insolvent." This was two years after the order of the Orphans' Court of 1867. This is certainly no charge of insolvency on or before May 8th, 1868. A charge of insolvency "*ought to be so distinctly introduced as to exclude all conclusions to the contrary.*" See *Young vs. Lyon, et al.*, 8 Gill, 168.

The order of May 8th, 1867, being by a Court of competent jurisdiction, and *known to defendants*, and not appealed from, is conclusive, and cannot be set aside in a collateral proceeding. See deed of April 27th, 1863.

If the complainants have any ground of action against these defendants, the same is triable and determinable at law, and ought not to be inquired of by this Court.

*Williams on Executors*, p. 538, says: "There is no case in England in which sureties on the bond of an executor have been made to answer in equity." See *Bolton vs. Powell*, 14 Bevan Cases in Chy., 286. The case cited in *Brooke vs. Brooke*, 12 G. & J., 306, were, under the laws of certain States, by which "if an executor commits a *devastavit*, suit upon his bond against his securities cannot be maintained, until the *devastavit* against the executor be

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established in a suit at law." In such cases, the death of the executor before suit at law against him would of necessity give jurisdiction in equity. But no such provision as to suits by *legatees* exists in Maryland.

Carson made a final settlement in the Orphans' Court on 8th May, 1867. That is *prima facie* evidence of the state of the account; the complainants admit its correctness in the bill. The only complication, if any, grows out of their dealings with Carson without the knowledge and consent of the sureties. But even these were adjusted in case of Heflebower.

Even if the complainants could go into equity for an account, yet Carson's administrators, necessary parties thereto, are not made defendants in the cause.

The bill, in brief, discloses the full discharge of these sureties.

1. By the settlement of the trust under the law and the terms of the will.

2. By the order of Orphans' Court of May 8th, 1867.

I. By the true construction of Edes' will, Carson was both executor and trustee; but the words "by my executor hereinafter appointed" are merely *descriptio personæ*, and convey no interest to him after his settlement with the Orphans' Court. *Perkins vs. Lewis*, 41 Ala., 649, and cases cited.

*Rieman vs. Peters*, 2 Md., 104, was decided upon the singular clauses of that will, and does not apply here.

Admitting this construction, then, on the final settlement of the executor, the money on hand by operation of law vested in him as trustee. *State vs. Jordan*, 3 H. & McH., 180; *Seeger's Estate vs. State*, 6 H. & J., 162-165; *Watkins vs. The State*, 2 G. & J., 220-225; *Hanson vs. Worthington*, 12 Md., 440; *Taylor vs. Debois*, 4 Mason, 133.

II. But whatever the provisions of the will, they cannot divest the Orphans' Court of the power conferred by Art. 93, sec. 10, of the Code.

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The order of 8th May, 1867, directed Carson to transfer to himself as trustee the balance of money in his hands. This he did in his final account, which was approved by that Court. *Vandever's Appeal*, 42 Penn. St. R., 74.

But suppose the Orphans' Court erred in passing this order, yet it was competent for them to pass it, and it was final until reversed. *Gunther vs. The State*, 31 Md., 28-32.

The complainants could have appealed from this order within thirty days. Even if they had no notice of it at the time, yet they were bound to appeal or file a petition to set it aside, within thirty days after actual knowledge of its passage. *Redman vs. Chance*, 32 Md., 42.

The bill admits such knowledge by them, and even adopts that order and Carson's receipt of the money as trustee as the consideration of the deed of 27th April, 1868.

The order then is valid, and cannot be impeached collaterally. *Cockey vs. Cole*, 28 Md., 276; *Porter vs. Timanus*, 12 Md., 283.

It is submitted in *Rieman vs. Peters*, that if the executors had not appealed, the transfer of the personal property to the trustees would have been a finality.

But the bill alleges that Carson did not comply with the order, as specially argued and set out by complainants, yet at the same time, admits his final settlement, in which he credits himself with the order, and admits his ability to answer the demand.

Distributees and residuary legatees have no lien on any specific money, or indeed upon any assets in the hands of the executor. *Salmon vs. Clagett*, 3 Bland's Ch'y, 169, citing 1 Atkyns, 463; see *Perry on Trusts*, sec. 847.

There could be no default until the legacies were due, which is after final settlement. Art. 93, sec. 119, of Code; *Lowe vs. Lowe*, 6 Md., 354; *Seeger vs. The State*, 6 H. & J., 162; 2 *Williams on Ex'rs*, p. 1279, note 6, sec. 446.

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The complainants having taken the whole proceeds of the sale of the property, are estopped from denying its full force and effect. 11 *Gill & J.*, 314, 326, 327.

By this deed, all claims upon the bond were released by the acceptance of the property conveyed to them. It was a substitution. *Mailhouse vs. Frazier*, 25 *Md.*, 96-105.

These complainants having, in *Heflebower's Case*, relied upon certain facts, and thereby recovered certain sums of money, are not at liberty now to deny, 1st, that the order of May 8, 1867, was valid and properly passed. 2nd, That Carson was solvent. 3rd, That the assets of the estate were in Carson's hands as trustee, and not as executor, and hence are estopped from proceeding against the sureties on the executor's bond.

The effort made by the introduction of evidence to deprive one of the sureties, Thomas M. Lanahan, of the defences made by the demurrer, has wholly failed.

If the dealings with the sureties released one of them, Garey, in reference to whom there is no pretence of even knowledge of the execution of the mortgage or deeds in question, then the proceeding in this case being against them jointly, both are released.

ROBINSON, J., delivered the opinion of the Court.

This is a bill in equity by residuary legatees, to enforce the personal liability of sureties on a testamentary bond for a *devastavit*, alleged to have been committed by an executor.

Such a proceeding it must be admitted, is under our practice an unusual one, for although an executor strictly speaking, may be considered as a trustee, and as such, may be held accountable in a Court of equity for the proper administration of the trust, yet it is clear the sureties maintain no such relation. On the contrary, their obligation being one of contract, the remedy for a breach of it must as a general rule be by an action at law on the bond.

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No case can be found in this State in which it has been held that they are liable in equity. The question was not decided in *Knight and Wife vs. Brawner, et al.*, 14 Md., 1, for the reason that no objection having been made in the Court below as to its jurisdiction, this Court was precluded by the Act of 1841, chap. 163, from considering such an objection on appeal.

The decisions however in analogous cases are all with one accord against the jurisdiction now claimed. In *Boteler & Belt vs. Brooks, 7 G. & J.*, 143, where an application was made to the Chancellor to compel the sureties on a trustee's bond to bring into Court, the proceeds of sale of mortgaged premises sold in pursuance of a decree in equity, it was held, that although the trustee as an officer of the Court, was bound to obey its orders in all matters concerning the trust, yet the sureties on his bond maintained no such relation. The Court said :

“They have no official duties to perform; assume no responsibility to the Court, but in general, enter into a merely pure legal contract of suretyship, incapable of coercion, except through the medium of the appropriate forum for the enforcement of such contracts—a legal tribunal.”

The doctrine thus laid down, was sanctioned and approved in *Brooks vs. Brooks, et al.*, 12 G. & J., 319, subject however, say the Court, as all other general notes, to some exceptions. In that case, a trustee to sell real estate, under a creditor's bill, wasted the funds, and died before an audit was made, without leaving any estate upon which an administration could be had, and it was held, that inasmuch as an action at law could not under such circumstances be maintained on the trustee's bond, the sureties thereon, ought to be held accountable in equity, otherwise the parties entitled to the trust fund, would be without remedy.

The practice in England is strictly in accord with these decisions, and in *Williams on Executors*, vol. 1, page 538,

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it is said: "That no suit in the first instance, has ever been instituted in equity against the obligors of a testamentary bond," in support of which, the author refers to *Bolton vs. Powell*, 14 *Beav.*, 275. In that case, a bill was filed by the *administrator de bonis non*, of David Bolton, against the representatives of William Bolton and the sureties on his bond, alleging a *devastavit* by the said William as administrator of David, and Sir JOHN ROMILLY, Master of Rolls, said:—

"The proper course as it appears to me, was, to have instituted proceedings in a Court of common law in the name of the obligee of the bond, for the purpose of enforcing the penalty. I am confirmed in that view of the case by the circumstance, that no case has been found in equity (though if the jurisdiction existed in equity, there must have been many,) in which any such suit has been instituted in the first instance in a Court of equity."

If there be any exceptions to the general rule thus laid down, it is clear both upon principle and upon authority, that there must be *special and peculiar circumstances* making the exercise of jurisdiction necessary to the protection of the rights and interests of parties. The inquiry then is, are there any *such facts and circumstances in this case?*

Under the will of Edes, Carson was appointed both executor and trustee, and the bill alleges, that as executor he received large sums of money belonging to the estate, which he transferred to the banking house of Carson & Co., of which he was a member, whereby the same became wholly lost and wasted—that the Orphans' Court, upon the application of Carson, passed an order directing him to transfer to himself as trustee under the will, the amount remaining in his hands as executor—that under the will it was his duty as executor to have kept together the whole estate until the death of the testator's mother, a contingency which had not happened when said order was

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passed—that the order was *ex parte*, and never in fact, and in good faith complied with by Carson; nor was any security given by him for the money thus unlawfully directed to be transferred to himself as trustee, except an *unrecorded conveyance of certain lots of ground in Baltimore City to himself as trustee for the parties in interest under the will*, which said unrecorded conveyance was found among his papers after his death.

That subsequently, a bill was filed by one Heflebower, in behalf of himself and other creditors of Carson, alleging an insufficiency of the personal estate to pay his debts, and praying for the discovery and sale of the real estate, and that under these proceedings, the several lots of ground conveyed by Carson to himself as trustee, to secure the appellants, parties in interest under the will, were sold, and the proceeds of sale brought into Court for distribution. That among other creditors, the complainants came in by petition, claiming to be general creditors of the *decedent* for and on account of the balance due by him on his final administration account, also for money received by him under a voluntary deed of trust executed by the complainants, and also *claiming under the unrecorded deed to himself as trustee, a specific lien upon the proceeds arising from the sale of the several lots of grounds mentioned in said deed*. That the specific lien and preference thus claimed, was allowed by the Court, and the sum of eleven thousand, nine hundred and sixty-three dollars and fifteen cents, being the entire net proceeds of sale arising from the sale of said lots, was under the order of the Court, paid to the complainants.

The bill further alleges, the appellees had personal knowledge of these matters, having been of counsel for Carson, as executor and trustee, and especially advising him in regard to said transactions.

These are the special facts and circumstances which the appellants contend, ought to exempt this case from the

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operation of the general rule of law, and sufficient to justify the exercise of jurisdiction by a Court of equity, for the purpose of enforcing the personal liability of the sureties on Carson's administration bond; and yet when considered separately or together, they present nothing more or less than an ordinary case of a *devastavit* by an executor, for which the complainants had a *plain, adequate and complete remedy at law*. There is not a particle of evidence necessary to prove either one or all the material facts averred in the bill, but what could be offered in a Court of law, and upon the facts thus established, it was within the province of a jury under instructions from the Court, to have determined the rights and liabilities of the parties.

The death of Carson, the executor, in no manner affected the liability of his sureties as surviving obligors in an action at law; and as to complication of accounts, or mutual and adverse claims, or controlling equities, we have not been able to find anything in this record, to justify the jurisdiction of a Court of equity upon such grounds. On the contrary, under the proceedings in Hefebower's creditors' bill, Carson's entire estate, real and personal; the names and amounts due to his creditors; the amount remaining in his hands as executor under the will of Edes; the sums received under the *conventional deed of 1866*; the amount received by these complainants by virtue of their specific lien, under the unrecorded deed to Carson, as trustee for parties in interest under the will; all of these matters are ascertained, and if the appellees were liable as sureties on the testamentary bond, the jury could have had but little difficulty in ascertaining the precise amount which the appellants were entitled to recover. If the sureties on a testamentary bond are under such circumstances, to be held liable in equity, it is difficult to imagine a case in which the jurisdiction may not be exercised.



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For these reasons we are of opinion that the demurrer to the bill was properly sustained, and here we might rest our decision, but inasmuch as the whole case has been fully argued and considered, we deem it proper to add, that even conceding the jurisdiction now claimed, we are of opinion that under the facts and circumstances disclosed by the record, the appellants are precluded from recovering against the appellees as sureties of Carson.

The clause in the will under which this controversy arises, is certainly obscure, and it may not be easy to determine when the duties and liabilities of Carson as executor ceased, and those as trustee began. Be this as it may, one thing is certain, the Orphans' Court considered his duties as executor at an end, upon the passage of his final administration account, and accordingly they directed the funds thus remaining in his hands, to be transferred to himself as trustee under the will. This order was passed by a Court having jurisdiction of the subject-matter, and of which the appellants, parties in interest under the will, are presumed to have had notice. No objection was made to the action of the Orphans' Court in the premises, nor has any appeal been taken from the order thus passed. But this is not all. When a bill was filed by the creditors of Carson for the sale of his real estate to pay debts, we find these appellants coming into Court by petition, and alleging that the Orphans' Court, by its order of May 8th, 1867, directed Carson to *transfer to himself as trustee under the will, the money, and also the stocks remaining in his hands as executor, and that they had in the life-time of Carson, expressly requested him to secure the money thus in his hands as executor and trustee, and that in pursuance of such request, he did, by a deed executed but not recorded, convey to himself as trustee for the appellants, certain lots of ground in Baltimore City; that these lots had been sold under the decree passed in the suit of the creditors. The appellants further claimed that under the unrecorded deed*

to Carson himself as trustee, they were entitled to a *specific lien upon the proceeds arising from the sale of said lots*.

Here then is not only a recognition by these appellants of the order of the Orphans' Court, but an admission also that under it, Carson had transferred to himself, as trustee, the money remaining in his hands as executor, and that the unrecorded deed was executed *expressly at their request* and for the purpose of securing the money *thus held by him as trustee*. The specific lien thus set up by the appellants was allowed by the Court, and they received the entire proceeds of the sale of the property conveyed by the unrecorded deed, amounting to over eleven thousand dollars.

Having thus treated Carson as trustee under the will, and having received the proceeds of the property which was conveyed by him to secure the money thus held by him, as trustee, the appellants now sue the sureties on his administration bond, and say that it was his duty under the will, to have kept the estate together as executor until the death of the testator's mother, and that the order of the Orphans' Court is invalid, and that Carson never in fact transferred to himself as trustee under the will, the money and funds remaining in his hands as executor. This is certainly claiming at one time in one right, and then at another time setting up a claim not only inconsistent with, but in fact utterly denying the first. "A man shall not be allowed" says the Court of Exchequer, in *Cave vs. Mills*, 7 H. & W., 927, "to blow hot and cold, to claim at one time and deny at another."

Nor is it any answer to say the claim to and receipt by the appellants, of the entire proceeds arising from the sale of the property mentioned in the unrecorded deed, worked no injury to the sureties on Carson's administration bond. If the money remaining in his hands as executor was not in fact transferred by Carson to himself, as trustee under the will, and if the unrecorded deed was not as it purports on its face, executed for the purpose of securing the money

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thus held by him, then the claim to and receipt by the appellants of the eleven thousand dollars, being the entire proceeds arising from the sale of the property thus conveyed, was in law a fraud upon the general creditors of Carson, who upon the facts now alleged by these appellants, were entitled to participate in the distribution of of that fund. And whether you say the appellants are estopped by such proceedings, or by whatever name you may call it, common sense and common justice requires that having claimed and having received, the entire proceeds from the sale of the property conveyed by the unrecorded deed, upon the express ground that it was executed by Carson to secure these appellants on account of the money belonging to them and which he held as trustee under the will, they shall not now be permitted to deny these facts in a suit brought against the sureties on the administration bond.

Before concluding this opinion, it is but proper to notice an objection made by the counsel for the appellants on the ground that the respondents had demurred to part of the bill, and answered the rest of the bill. The right to do so, provided the demurrer and answer apply to different and distinct parts of the bill, and be not inconsistent with each other, is too well settled to be questioned. See *Story on Equity Pleading*, sec. 442, and the cases cited. The demurrer in this case was properly sustained, and the decree below will be affirmed.

*Decree affirmed.*

(Decided 1st March, 1877.)

ELIZABETH THOMAS, and others, Terre-Tenants of  
HENRY W. THOMAS, and others *vs.* THE PRESI-  
DENT, DIRECTORS AND COMPANY OF THE FARMERS'  
BANK OF MARYLAND.

*Construction of Act of 1865, ch. 144—Pleading—Misnomer—  
National Banks—Constitutional Law—Parties to suits in  
Equity—Parol proof to explain a record—Scire Facias  
against Terre-Tenants—Sheriff's return.*

If the existence of a person or corporation suing be denied, the plea is in bar. National banks, as Federal agencies, are only exempted from State legislation so far as it may impair their efficiency in performing the functions by which they are designed to serve the government of the United States. It is only when a State law incapacitates them from discharging these duties that it becomes unconstitutional.

The Farmers' Bank of Maryland recovered judgment in 1864, against T. and others. The Act of 1865, ch. 144, authorized the State banking institutions to become banking associations under the laws of the United States, and provided for the surrender and extinction of their State charter, with a *proviso*, "that said bank, etc. may continue to use its corporate name for the purpose of protecting and defending suits instituted by or against it, and of enabling it to close its affairs, but not for the purpose of continuing under the laws of this State its business," etc. In pursuance of this Act and of the Act of Congress of June 3rd, 1864, which provides that the national banks, organized thereunder shall have a corporate name by which they shall sue, etc., the Farmers' Bank of Md., in June, 1865, was converted into the Farmers' National Bank of Annapolis, and in May, 1874, under its original corporate name, it sued out a *scire facias* on the above judgment against the original defendants and certain terre-tenants. **HOLD:**

- 1st. That the Act of 1865, ch. 144, simply confers a privilege and is not in conflict with the Act of Congress.
- 2nd. That the *scire facias* could issue in the name of the Farmers' Bank of Maryland.

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3rd. That the Farmers' National Bank of Annapolis is the substantial plaintiff, and in case of judgment for defendants would be liable for costs.

In the case of a general creditors' suit, or where there is a fund in Court and an order requiring creditors to come in to participate in the distribution, the simple fact that a party appears and files his claim, raises the presumption, that he intends to make himself a party to the record.

Where a suit is instituted, not for the benefit of creditors generally, but for the enforcement of some special right, as for the foreclosure of a mortgage or the enforcement of a vendor's lien, and a third person desires to come in and be made a party, he should, by some appropriate allegation, make known the nature and character of his right. In the absence of such allegation or statement of record, the mere fact that a short copy of a judgment in favor of a third person was found filed, with other judgments, in such an equity cause is not binding and conclusive record evidence that such person became a party thereto. And in such case, parol proof that the copy of the judgment was filed without proper authority is admissible.

The plaintiff, in a special *scire facias* against terre-tenants must name all the tenants holding lands subject to the lien of the judgment; if he omit to do so, those who are named may plead in abatement.

A *scire facias* against terre-tenants is, so far as they are concerned, a proceeding strictly *in rem*, and it is essential that the land to be affected by the judgment should be properly described.

Whether a *scire facias* against terre-tenants be general or special, the particular lands of which they are tenants, remaining subject to the judgment lien, must be described in the sheriff's return; and in case of judgment the *feri facias* that issues upon it must give a sufficient description of it to enable the sheriff to levy upon it.

Where a *scire facias* was issued against three terre-tenants of T., and one of the defendants' pleas alleged that a part of the land of T. was purchased by each of two of the tenants named, under a decree for the enforcement of a vendor's lien, which was prior to the rendition of the judgment recited in the *scire facias*. **HELD:**

That no identity or sufficient description of the land can be derived from such allegation.

Where, in a *scire facias* against terre-tenants, there is no sufficient description of the lands appearing of record, either by the sheriff's return or in the pleadings, the Court cannot resort to the evidence offered to the jury for the purpose of obtaining a description of the lands against which to render the judgment.

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APPEAL from the Circuit Court for St. Mary's County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., STEWART, GRASON and ALVEY, J.

*Frederick Stone and J. Shaaff Stockett*, for the appellant.

The Act of Congress creating the National Banks was a valid exercise of power; they derive all their rights from the National Legislature, and the State Legislatures can neither add to nor subtract from these rights. *Farmers' Natl. Bank vs. Dearing*, 91 *S. C. Rep.*, 29.

We must, therefore, look exclusively to the Acts of Congress establishing National Banks, to ascertain their rights, powers and privileges. It would certainly be an anomaly, for a corporation to derive part of the powers necessary for its corporate existence from one Government, and part from another. The right to sue and be sued is a right essential to the existence of every corporation, and the laws of the State of Maryland can no more extend, or restrict or change the powers of the National Banks in this respect than in any other.

If the Legislature had the power to authorize a dead corporation to sue, it must equally have the power to authorize it to be sued.—The insurmountable difficulties in the latter case are apparent at a glance. The liabilities equally with the rights are transferred by operation of law. How are we to recover our costs in this case, should the Court adjudge them to us, if the National Bank should refuse to pay them? Would it not be a flat answer to our demand for them to say that they were not a party to the suit?

There are cases where, upon the expiration of a charter, the Legislature has the undoubted right to extend some of

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their corporate powers for the special purpose of allowing the corporation to close its affairs. But the State can exercise such power only over a corporation over which it has exclusive control.

It could not prevent the Farmers' Bank of Maryland from becoming a National Bank. The consent of the State thereto was not at all necessary. The Act of 1865, chap. 144, seems to have been passed merely out of abundant caution. Besides, nine years elapsed after that Act was passed, before the writ in this case was issued.

The only extension of the corporate name contemplated by the Act, was time enough to close the business and no longer. The Legislature never intended an indefinite period. The suits mentioned only mean the suits then pending, and can never be construed to mean all suits for all time that might thereafter be brought.

There is no clearer principle enunciated in every text-book upon evidence, than that parol testimony is not admissible to contradict, add to, or vary a record. The record must speak for itself, and no witness will be heard to speak for it.

This Court has already said in this case, (37 Md., 257,) "It will be sufficient if it appear from the record, that he has appeared to the suit and filed his claim," &c.

The plaintiff himself offered in evidence the record for a particular purpose, and upon the defendants relying upon the same record to prove another fact, the Court below permitted him to offer parol evidence to contradict or explain that record in a particular part thereof. The plaintiff may have well asked the Court to instruct the jury as to the true construction of that record, but he was not authorized to attempt to falsify it by parol evidence. He cannot offer a record to prove one fact, and then attempt by parol to nullify another fact disclosed by the same record. *State, use of Sprigg vs. Jones*, 8 Md., 95; *Tabler vs. Castle*, 22 Md., 94, 101; *Ranoul vs. Griffie*, 3 Md., 54.

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We by no means say that a party is bound by a record to which he was not a party. If the record avers that he was a party thereto, when in fact he was not, the record so far must be tainted with fraud or mistake. The right of the party by a proper proceeding *in equity* to correct this fraud or mistake is unquestioned.

A judgment is necessarily based upon the record in the case in which the judgment is rendered. Judgments are not founded on the evidence in the case, but entirely upon the pleading and verdict. The verdict itself must be based on pleading.

The proceedings in *scire facias* against a *terre-tenant* is a proceeding *in rem*. The whole object of the suit is to make certain lands in the hands of the alienee of the original debtor liable for the debt. The alienee himself is not personally liable for the debt. The material facts to be found by the jury are these: 1st, That there is some amount due on the original judgment and what the amount is. 2ndly, That the defendant, (*terre-tenant*,) is in possession of land which belonged to the original debtor after judgment was obtained against him, and what land it is, describing the same with reasonable certainty. Now the jury in this case found nothing except the amount due on the original judgment. There is nothing in any part of the pleading that would aid the verdict. Whether the land is one or one thousand acres or where it lies, is nowhere disclosed in the pleading and verdict. See 2 *Evans' Harris*, 336, 343, 364, 365.

The Court below seemed to be aware of the imperfect state of the record on this point, and in the judgment that was rendered by it referred to the record in another case for a description of the land. Now this last mentioned record was only before the Court as evidence. If the Court below could call to their aid the record evidence offered in the case, to aid them in making up the judgment, they could also base their judgment on the parol evidence.



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"Cured by verdict means that the Court will, after verdict, presume or intend that the particular thing required to sustain it was proved at the trial." *Merrick vs. Bank of Metropolis*, 8 Gill, 64.

But the verdict itself is incurable by any action of the Court. *Stirling vs. Garritee*, 18 Md., 468; *Code, Art. 75, sec. 9*; *Miles vs. Knott*, 12 G. & J., 442, 465; *State vs. Carleton, et al.*, 1 Gill, 249; *Hatton vs. McClish*, 6 Md., 407, 410, 418; *Pettibone vs. Gozzard*, 2 Root, 254; *Smith vs. Raymond*, 1 Day, 189; *Kierle, et al. vs. Shriver*, 11 G. & J., 405.

A judgment that goes beyond a verdict will be arrested. The judgment must be in accordance with the verdict, and if the whole record, down to and including the verdict, is so uncertain that it would not be a bar in a subsequent suit, for the same cause of action the judgment will be arrested. The sheriff's return to the writ should describe the land with certainty. 2 *Evans' Harris*, 510.

*Alexander Randall*, for the appellees.

The Court correctly sustained the demurrer. *Nat. Pahquioque Bk. vs. First Nat. Bk. of Bethel*, 36 Conn. Rep., 325; *Cooke vs. The State Nat. Bk. of Boston*, 52 New York Rep., (7 Sickels,) 105; *First Nat. Bk. of Whitehall vs. Lamb, et al.*, 50 New York Rep., (5 Sickels,) 95; *Nat. Bk. vs. Commonwealth*, 9 Wallace, 353; *Coffey vs. Nat. Bk. of Missouri*, 46 Mo., 142; *Regents' Case*, 9 G. & J., 365.

To prove the requirements of this Court in 37 Md., 257, 258, the only proof offered by the defendant was the mere finding, among the papers in the equity suit, of a short copy of the plaintiffs' judgment, not certified by the clerk, not ordered to be filed, not proved by plaintiffs, which with nine other short copies of such judgments, obtained by other plaintiffs, were marked "filed." This one fact, of the many required, could but raise a presumption against the

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plaintiffs, and like all other presumptions, could be repelled by other facts—and the facts offered by the plaintiffs were sufficient for that purpose. 1 *Phil. Ev.*, 237, referring to 2 *John. Rep.*, 24, and 10 *John. Rep.*, 51; *Negro Joe vs. Burke*, 6 *G. & J.*, 136; *Craufurd vs. The State*, 6 *H. & J.*, 234; *Garrott vs. Johnson*, 11 *G. & J.*, 173; *Barry vs. Hoffman*, 6 *Md.*, 78; *Newcomer vs. Keedy*, 9 *Gill*, 264; *Campbell vs. Booth*, 8 *Md.*, 107,—corrected by 1840, *ch.* 96; *Moreland vs. Bowling*, 3 *Gill*, 502.

The proceedings in the equity cause against Henry W. Thomas, were solely to enforce a vendor's lien. Now, in that cause, in order to enable the plaintiffs to be paid their judgment out of any surplus of the proceeds of sale, it was required of them, to become parties to the suit by filing a petition, setting forth all the facts against the other parties thereto; filing their judgment, duly certified and proved as an exhibit; requiring answers of the other parties; making proof of their claim, and obtaining an order or decree of the Court to pay it.

A sufficient description of the land held by the defendant as *terre-tenant* was set out in the defendant's 3rd plea, and the replication thereto, and record evidence offered thereof by plaintiff.

In this case, no such description of the land is required to appear in the *scire facias*, return thereto, pleadings or verdict. 2 *Evans' Harris' Entries*, No. 73, p. 364; *fi. fa.*, Nos. 96 and 97, pp. 436 and 437; 2 *Harris' Entries*, pages 143, 173, 764, 765 and 767.

If required, its absence is cured by the verdict and by Art. 29, section 14, of the Code. 2 *Tidd's Prac.*, 824, top; *Foster on Scire Facias*, 73 *Law Lib.*, 324; *Eakle vs. Clarke*, 30 *Md.*, 322; *Gover vs. Turner*, 28 *Md.*, 600; *Browne vs. Browne*, 22 *Md.*, 115.

Should there be any mere formal objection to the judgment, this Court will amend it. *Clarke vs. Digges*, 5 *Gill*,

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110; *State vs. Turner*, 8 G. & J., 125; *Kent vs. Lyles*, 7 G. & J., 73.

ALVEY, J., delivered the opinion of the Court.

The Farmers' Bank of Maryland recovered judgment in the Circuit Court for St. Mary's County in 1864, for \$1250, against Henry W. Thomas and others. After the recovery of this judgment, the bank was converted into a national banking association, under the provisions of the Act of Congress, entitled "An Act to provide a national currency," &c., approved June 3rd, 1864, (U. S. R. St., sec. 5154, p. 1002,) with the name and title of "The Farmers' National Bank of Annapolis." In addition to the authority for the conversion contained in the currency Act, to which we have referred, the Legislature of the State, by the Act of 1865, ch. 144, expressly authorized the several banking institutions incorporated by the laws of the State to become banking associations under the laws of the United States; and by the third section of this Act of 1865, provision is made for the surrender and extinction of the State charters of the banks so converted, with a *proviso*, "that said bank, savings institution or savings bank, may continue to use its corporate name for the purpose of prosecuting and defending suits instituted by or against it, and of enabling it to close its affairs, but not for the purpose of continuing under the laws of this State, the business for which it was established," etc. The conversion of the original plaintiff in the judgment from a State to a national bank, took place in June, 1865, after the passage, and in pursuance of the Act of the State authorizing the conversion, and in May, 1874, a *scire facias* was issued on the judgment against the original defendants, and certain terre-tenants of the lands which had belonged to the defendants at the time or since the rendition of the judgment; the plaintiff using its original corporate name, in which the judgment was recovered,

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instead of the name acquired under the law of the United States.

To this *scire facias*, various defences were taken by two of the terre-tenants named in the writ; and among these defences, the plea of *nul tiel record* was interposed, and also the plea of *nul tiel corporation*, or that the corporation named as the plaintiff in the writ had been dissolved, and its charter surrendered and abandoned.

As to the plea of *nul tiel record*, we understand the appellants as making no question on that in this Court; and we therefore pass it over without further remark. But the question of the supposed disability of the appellee to sue by its former corporate name has been strongly urged by the appellants; and as it is preliminary to all other questions that can arise in the case, it is proper that it should be first decided. The question is raised by demurrer to the rejoinder by the defendants to the replication to the defendant's second plea.

1. It is laid down in 1 *Bac. Abr.*, 33, as a settled principle in pleading, that if the existence of the person or corporation suing be denied, the plea is in bar; for if there be no such person or corporation, there is an end of the action; and this principle has been sanctioned by this Court, in the case of the *Bank of Metropolis vs. Orme*, 3 *Gill*, 444. But the question here is, not whether the particular corporation recovering the judgment is still in existence, but whether there be competent authority delegated to the existing corporation, organized under the law of the United States, and by a name different from that derived from the State, to prosecute and defend suits in the name of the former corporation, that is to say, in the name of the corporation that recovered the original judgment?

By the fourth section of the Act of 1865, ch. 144, it is declared that whenever any bank in this State shall have surrendered its charter, and become an association for the purpose of banking under the laws of the United States,

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all its assets, real and personal, *without other transfer*, shall vest in and become the property of such association, and that such association shall be responsible for all the debts and liabilities of said bank, incurred prior to the surrender of its charter. From the terms of this Act, as well as those found in the Act of Congress, it is manifest that, by the act of conversion from a State into a national bank, all the assets of the former, including all judgments, were, by operation of law, transferred and assigned to the latter; and such being the case, it is clear that the present national bank would have the right to sue as assignee. But it was supposed that there might be suits depending, liable to abate, or judgments recovered remaining to be executed or reviewed, and where it would be convenient and proper that the proceedings should be carried on to final termination without the necessity of a change in the name of the party upon the record; and hence the *proviso* in the third section of the Act of 1865, ch. 144.

It is, however, contended by the appellants, that because the Act of Congress under which the bank was organized provides that each banking association shall have a proper corporate name, and expressly authorizes it to sue and be used, complain and defend, in any Court of law, or equity, as fully as a natural person could do, therefore the State law, authorizing the prosecution or defence in the name of the former corporation, is in conflict with the provisions of the Act of Congress, and consequently void:—That a national bank can only sue by its proper corporate name, and that it is not competent to the State to authorize it to sue by any other. To this general proposition we cannot assent. If this were an attempt to defeat the right of a national bank to sue in its proper corporate name, and to require it to sue in a name different from its own, as a condition upon which it would be allowed to maintain its suit, under State statute, in such case, a real conflict would arise, and the State statute would have

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to yield to the right conferred by the United States law. But the Statute of 1865, ch. 144, so far as the right to prosecute is involved, simply confers a privilege, and it is optional with the national bank either to prosecute in its proper corporate name, or in that allowed by the State law. It is certainly competent to the State to regulate the mode and manner of prosecuting suits in her own Courts, and if such regulation does not hinder or impair the rights and powers conferred upon the bank by the laws of the Union, it is not perceived upon what principle the State law should be denied its force and efficacy. These national banks, as Federal agencies, are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve the government of the United States. Any other rule, says the Supreme Court of the United States, in the case of the *National Bank vs. Comm.*, 9 Wall., 362, would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. And in speaking of the dependence of the national banks upon the laws of the particular States where they may be located, the Court, in the case referred to, declared that such banks are subject to the laws of the State, and are governed in their daily course of business far more by those laws than by the laws of the United States. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, *their right to collect their debts, and their liability to be sued for debts*, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We can perceive no possible conflict, therefore, between the Act of 1865, ch. 144, and the Act of Congress under which the national

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banks are organized. "The Farmers' National Bank of Annapolis" is in reality the party plaintiff in the present suit, though prosecuting in the name of the "Farmers' Bank of Maryland;" and if there be a judgment for the defendants, the substantial plaintiff will be liable for costs.

It follows that the judgment on the demurrer in favor of the plaintiff was properly entered.

2. The next question to be decided is, whether the plaintiff in this cause became a party to the proceedings in the case of *Elizabeth Thomas vs. Henry W. Thomas*, on the equity side of the Circuit Court for St. Mary's County? That suit was instituted to enforce a vendor's lien upon the land of the defendant Henry W. Thomas, and under the decree there passed, the parties named as the terre-tenants in the present *scire facias* became purchasers of the land now sought to be made liable for the judgment recited in the writ.

In the case of the *Farmers' Bank of Maryland vs. Thomas*, 37 Md., 246, a *scire facias* on the judgment recited in the present writ, the terre-tenants appeared, and, with other pleas, pleaded that the plaintiff had notice of the suit in equity, and after the decree, and the sale thereunder, became a party by appearing and filing its claim as creditor of the said Henry W. Thomas; upon the judgment recited in the *scire facias*, and sought payment thereof, out of the proceeds of sale, &c.

That case was decided by this Court upon the pleadings alone; and it was held, upon the assumption of the truth of the allegations of the plea, that the plaintiff would be bound by the proceedings in equity, and estopped from enforcing the lien of its judgment against the land, the proceeds of which it had sought to have applied to the satisfaction of the judgment. If the Court erred in rejecting the claim, the plaintiff's remedy was by an appeal.

But in this case, the facts are disclosed in proof, and according to which the only evidence furnished by the

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record in the equity cause that the present plaintiff became a party thereto, is the single fact that there appears to have been filed on the 20th of September, 1867, nine short copies of judgments against Henry W. Thomas and others, in favor of divers persons, and among this number a short copy of the judgment recited in the present *scire facias*. It does not appear by whom or for what purpose this short copy of the judgment was filed. The clerk of the Court cannot say by whom he was directed to make the copy or file it. He is positive, however, that none of the officers of the bank gave him any direction in regard to it; and Mr. Harris, the local attorney of the bank, swears positively that he did not have the short copy filed. And in such state of case, it is too much to say, that there is binding and conclusive record evidence of the fact that the plaintiff in the *scire facias* became a party to the equity proceedings, and there sought payment of its judgment from the proceeds of the sale of the lands of the debtor.

In the ordinary case of a general creditors' suit, or where there is a fund in Court, and there is an order requiring creditors to come in to assert their rights and to participate in the distribution, in such and the like cases, the simple fact of a party's appearing and filing his claim in the cause, gives rise to the presumption that he intends to make himself a party to the record; for otherwise he would not be in a position to take the benefit of the proceeding. And this is the established practice. *Strike's Case*, 1 Bl., 85, 86. But where the suit is instituted not for the benefit of creditors generally, but for the enforcement of some special right, as for the foreclosure of a mortgage, or the sale of mortgaged premises, or the enforcement of a vendor's lien, there, if a third person be interested in the subject-matter, and desires to come in and to be made a party, or seeks payment of a claim from the fund in controversy, he should, by some appropriate allegation, make known the nature and character of his



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right, and the ground upon which he seeks to intervene. And this is required not only that the Court may be advised of the nature of the right, but to enable parties against whom it is asserted to meet and repel it, if it be unfounded or improper to be brought into the cause. *Ellicott vs. Welch*, 2 Bl., 242; *Hammond vs. Hammond*, 2 Bl., 306, 345. For the practice in such cases, see *Gaither & Warfield vs. Welch*, 3 Gill & J., 259; *Hays vs. Miles*, 9 Gill & J., 193; *Balch vs. Zentmeyer*, 11 Gill & John., 282.

If, however, as matter of fact, the plaintiff did file its judgment and seek payment thereof from the proceeds of sale of the land upon which its judgment was a lien, it would be estopped from enforcing its judgment against the land in the hands of the purchasers, notwithstanding its proceeding in making itself a party, lacked the form required by established practice. If formal proceedings had been adopted, or indeed any allegation or statement made of record, to show that the judgment had been filed by the plaintiff for the purpose of obtaining distribution from the proceeds of the land sold, the record itself would be conclusive evidence upon the subject. But as the record fails to furnish such conclusive evidence, the parol proof offered by the plaintiff was admissible, not for the purpose as supposed by the defendants, of contradicting the record, but for the purpose of preventing an improper conclusion being drawn from the fact that a short copy of the judgment was found filed in the equity case.

We think, therefore, there was no error in the ruling of the Court below as stated in the second bill of exception.

3. The case was tried by a jury, and the verdict being for the plaintiff, there was a motion in arrest of judgment; and the particular ground assigned was, that there was no sufficient certainty appearing in the record as to the land sought to be made liable for the judgment.

The verdict rendered was simply for a certain sum of money due on the original judgment; there being no issue

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made in the pleading that required the jury to find of what particular lands the defendants were terre-tenants. The Court, however, upon overruling the motion in arrest, directed judgment to be entered upon the verdict for the amount found to be due, and costs, to be levied of certain lands which were of Henry W. Thomas, and which had been sold under a certain decree to the said Elizabeth Thomas, and then held by her as terre-tenant. In entering this judgment we think the Court was in error.

A *scire facias* against terre-tenants is either general or special. It is general when it issues against all the terre-tenants of the judgment debtor, without naming them in the writ, but leaving them to be named in the sheriff's return; or it is special when the names of the terre-tenants are set forth in the writ. But the plaintiff, in the latter case, must be careful to name all the terre-tenants holding lands subject to the lien of the judgment, for if he omit to do so, those who are named may plead in abatement. *Jeffreson vs. Morton*, 2 Wms. Saund., 7, (4;) *Proctor vs. Johnson*, 2 Salk., 600.

In this case, the *scire facias* was issued in the special form, naming the terre-tenants to be warned, and commanded the sheriff to make known to the defendants in the judgment, and the terre-tenants named, being terre-tenants of all the lands of the defendants, etc. To this writ the sheriff simply returned, "Made known to all except W. A. Lyon."

The sheriff's return to a *scire facias* against terre-tenants must always be of a special character. The proceeding, so far as the terre-tenants are concerned, is strictly *in rem*, and it is essential that the land to be affected by the judgment should be properly described. In 2 *Tidd's Prac.*, 1124, in speaking of the sheriff's return to these writs, the author says that the return is either that there are no such tenants, or that he, the sheriff, has warned them to appear. "In the latter case, if the writ be general, the

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sheriff should return that he has warned certain persons, being the tenants of *all* the lands in his bailiwick, describing them; or the tenants of certain lands, and that there are no others: a return that he has warned the tenants of all the lands generally, or certain persons, tenants of lands in his bailiwick, being insufficient." Whether the tenants be named in the writ or not, the particular lands of which they are tenants, remaining subject to the judgment lien, must be described in the sheriff's return. To see with what particularity and fulness such returns are made, it is only necessary to refer to the precedent found in *2 Harris' Ent.*, 174. If there be no question as to the seisin of the judgment debtor, or the holding by the alleged tenant, of the lands returned, the judgment is entered for whatever may be found due on the original judgment, to be levied and made of the particular lands mentioned and described in the return to the writ. For form of judgments in such cases, see *2 Harris' Ent.*, 143, 258, and *Jeffreson vs. Morton*, *2 Wms. Saund.*, 19. And the *feri facias* that issues upon the judgment, must give a sufficient description of the land to enable the sheriff to levy upon and seize it, to satisfy the judgment. *2 Harris' Ent.*, 690.

In this case, as we have seen, the sheriff makes no mention of or reference to any land whatever in his return. There are three terre-tenants mentioned in the writ; but of what particular lands these parties are tenants,—what quantity or where located,—nowhere appears. In the defendant's third plea, it is alleged that a part of the land of Henry W. Thomas was purchased by each of two of the parties named in the writ as tenants, under a decree for the enforcement of a vendor's lien which was, as it is alleged, prior in date to the rendition of the judgment recited in the *scire facias*. But it is clear that no identity or sufficient description of the land can be derived from such allegation. It does not appear what particular part of the land each tenant purchased, or that any part of such land

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was subject to the lien of the judgment. The judgment rendered upon the verdict should be supported by the record. The Court could not resort to the evidence that had been offered to the jury, for the purpose of obtaining a description of the land against which to render the judgment. There was no sufficient description of the lands appearing of record, either by the sheriff's return or in the pleadings, to justify the entry of the judgment by the Court; and therefore the motion in arrest should have prevailed.

*Judgment reversed.*

(Decided 1st March, 1877.)

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J. CASEY BARRY and SAMUEL E. HOOGEWERFF vs.  
EDWARD BONINGER and ROBERT LEHR.

*Broker's lien—Principal and agent—Question as to the right of a Broker to retain out of the Proceeds of a cargo sold by him for an Agent, brokerage due him by the agent for the sale of other cargoes not belonging to the same principal.*

Brokers do not usually possess the right of general lien, though, like other agents they may be in a situation to exercise the right of particular lien.

A cargo of sugar was imported by S., A. & Co. under letters of credit from the plaintiffs dated July 27th, 1875, and arrived in Baltimore under bills of lading in the name of the plaintiffs, in accordance with the agreement between the plaintiffs and S., A. & Co. as contained in the letter of credit. Upon the arrival of the vessel, S., A. & Co. gave a receipt to the plaintiffs for the sugar specified in the bill of lading, in which it was stated that they agreed to hold the sugar on storage as the property of the plaintiffs, with liberty to sell the same and account to them for the proceeds, until the amount of drafts drawn on S. & B. of London, in pursuance of the letter of credit, and accepted by them against the cargo of sugar, should be

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satisfactorily provided for. The cargo was sold to McK., N. & Co. of Philadelphia, through the defendants as brokers, but before it was all delivered S., A. & Co. failed on the 26th of August. The defendants were then on the 27th of August, authorized to deliver the balance of the cargo and to draw for the proceeds. Upon the receipt of the money from the purchasers, the defendants retained out of it the amount due them by S., A. & Co. for brokerage in selling other cargoes imported by them and not belonging to the plaintiffs. In an action brought by the plaintiffs against the defendants to recover the amount so retained, it was **Held**:

- 1st. That the property in the sugar was in the plaintiffs under the letter of credit and S., A. & Co's trust receipt.
- 2nd. That the property in the sugar so being in the plaintiffs the defendants had no lien upon it for, and could not retain out of it, the amount due by S., A. & Co.; for brokerage effected for them.
- 3rd. That the only claim the defendants could legally assert against the cargo of sugar or its proceeds, was for the amount of brokerage due them for effecting a sale of that particular cargo.

**APPEAL** from the Superior Court of Baltimore City.

This action was brought by the appellees against the appellants to recover a sum of money claimed by the appellees to be due them by the appellants, and retained by the latter under a supposed claim, the nature of which is stated in the opinion of the Court. The case was tried upon an agreed statement of facts, without the intervention of a jury, before the Court below, (DOBBIN, J.,) by whom the following rulings and decision were made:

"I have carefully read and considered the case stated, and the accompanying documents submitted to me, and am of opinion that the legal effect of the transaction set forth therein, was to vest the property in the sugars imported by Messrs. Stirling, Ahrens & Co., under the credit from the Messrs. Brothers Boninger, in the former firm, subject to the lien of the latter firm, for the repayment of the sums advanced under the credit.

"Conceding that a broker, with the money or other property of his principal in hand, may have a lien upon

it for his *general balance*, it does not follow that he can in all cases claim that lien when the money or property is only apparently the property of his principal, but is in fact the property of another. For the service he renders with reference to that particular property, as his commissions, for example, for its sale, he may claim against the owner whoever he may be, because the service has been rendered for the benefit of whomsoever may be the owner. But his claim for an antecedent debt, arising out of other transactions, must stand upon other and different grounds. There he can only claim to the extent to which his principal is interested in the subject of the lien. In the case of the service performed with reference to the goods on which the factor claims a lien, he may well be supposed to have performed the service upon the faith of his possession of those goods as his security. But in respect to an antecedent debt, no such reliance can be averred, and his claim must stand on the general law of lien as given by contract, either express or implied. That general law is aptly stated by C. J., TINDAL, in the case of *Brandao vs. Barnett*, 2 *Scott's N. Rep.*, 112, (*Eng. Ed.*) which though arising in a case between a banker and his customer, has precise application in principle to this.

“When the lien claimed is for an antecedent debt, and not contracted on the faith of the particular property in hand, I do not consider that the question can be affected by notice, or the absence of it of the real ownership. If the lien had been acquired under the *prima facies* of title afforded by the possession of the principal, and the factor had dealt on the faith of that apparent title, notice to him of the true ownership would be required to defeat his lien; but when the possession of the factor comes to him subsequently to his debt, and could have no influence in creating the debt, his claim of lien must be subordinate to the true state of the ownership, whether known to him or not.

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"I am of opinion, therefore, that the defendants, Messrs. Barry & Hoogewerff, can claim, out of the funds in their hands, only the brokerage on the Satterly's cargo, admitted to be \$298.32; and must pay to the plaintiffs the balance in their hands (after deducting said brokerage,) with interest from the 17th December, 1875."

The defendants excepted. The verdict of the Court was in favor of the plaintiffs and judgment was entered accordingly. The defendants appealed.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY and ROBINSON, J.

*Thomas Donaldson*, for the appellants.

The reliance of a factor or broker to whom is entrusted the delivering the goods sold, and the receipt of the proceeds, must in every case be on the apparent owner. The opinion of the Court does, indeed, admit that the claim for commission on the specific goods is a valid lien, because the service was done on the faith of such lien, but goes on to say that there is no lien for former services of like character, because they could not have been done on the faith of such lien. This does not follow. The appellants were in the habit of doing such services for Stirling, Ahrens & Co., and can it not be fairly presumed that such former services were done on the faith that goods and funds coming later into their power, as they had from the course of business every reason to believe, would bring them ample security for their compensation for such former services? *Bank of Metropolis vs. N. E. Bank*, 1 How., 234.

In this view, the question of notice and the time of it becomes material, which notice the Court ignored. There was, to be sure, a difference of recollection between the plaintiffs' and defendants' witnesses, but the opinion of the Court expressly shows that the Court did not pass on this question of fact.

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*Fred. W. Brune, Jr., and Fred. W. Brune*, for the appellees.

Brokers have no lien, by the law merchant, upon property or funds of *their principals*, coming into their hands, for the payment of brokerages due from their principals upon sales of other goods, made before such property or goods came into their hands. *Russell on Factors and Brokers*, 191-2-3, *marg.*, (48 *Law Library*.)

It is still more clear that the lien of brokers cannot be maintained for brokerages so earned, as against property or funds thus coming into their hands, which are not the property of their principals, and which they are informed, before it is received, does not belong to them. *Russell*, 200-1-2.

And it is clear from the weight of testimony in the agreement of facts, that the appellants knew, before they drew the draft of the 27th of August, that the proceeds of the Satterly's cargo did not belong to Stirling, Ahrens & Co., but to the appellees.

Even bankers cannot claim a lien upon securities received from their customers, if such securities were so acquired, under an express contract, or circumstances showing an implied contract, *inconsistent with such lien*. *Davis vs. Bowsher*, 5 *Term*, 491; *Brandao vs. Barnett*, 39 *E. C. L.*, 718, and 54 *E. C. L.*, 531-534.

It is clear, that the cargo of the Satterly, and its proceeds of sale under the letter of credit and trust receipt in evidence, were the property of the appellees, and the rights of the appellees in said property and proceeds, were in no wise affected by the act of the appellants in making sale of said cargo as brokers.

By the express terms of the sale, as well as under the general law in regard to brokers, the proceeds of sale were to be paid to Stirling, Ahrens & Co., and not to the appellants.

The letter of the 27th of August, upon which the appellants rest their right to assert a lien on the proceeds of sale



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of said cargo, received under said letter, is in itself no more than a notice to the purchasers of said cargo, that the appellants, previously known to them only *as brokers*, were, from the date of said letter, *authorized* to ship the balance of the cargo, and *to draw on them for the same*.

It is no assignment to the appellants of said cargo or its proceeds; it is a mere recognition and declaration of *an authority to draw*, which was necessarily countermandable at any time by Stirling, Ahrens & Co., before it was fully executed.

The appellees rely on the authorities already cited, to show that *brokers* ordinarily have no *lien* on the goods of their principals for their general balance of account with their principals.

And also to *Davis vs. Bowsher*, 5 Term, 491, already cited, and which is affirmed in the interesting case of *Brandao vs. Barnett*, cited by Judge DOBBIN, as decided by TINDAL, C. J., in 39 *E. C. L.*, 718; but which was appealed to the Exchequer Chamber, 46 *E. C. L.*, 666, and to the House of Lords, reported in 54 *E. C. L.*, 531, 534, and in which cases these principles are clearly established by the highest authority.

1st. That *bankers* have not a *lien* on negotiable *securities* in their hands, when such securities are received, under circumstances, *inconsistent with a lien*.

2nd. That a *banker* cannot acquire from a customer a *lien* on *goods*, or the proceeds of goods, on which the customer had no authority to give one.

GRASON, J., delivered the opinion of the Court.

The question presented upon this appeal is, whether the appellants are entitled to retain out of the proceeds of the sale of the "Francis Satterly's" cargo of sugar, an amount of money due them by Stirling, Ahrens and Company, for brokerage at the time of the failure of the latter firm on the 26th August, 1875. The cargo of the "Sat-

terly," was imported by Stirling, Ahrens and Company, under letters of credit from the appellees dated July 27th, 1875, and arrived in Baltimore under bills of lading in the name of the appellees, in accordance with the agreement between the appellees and Stirling, Ahrens & Co. as contained in the letter of credit. Upon the arrival of the vessel, Stirling, Ahrens & Co. gave a receipt to Boninger Bros., for the sugar specified in the bill of lading, in which it was stated that they agreed to hold in storage, as the property of Boninger Bros., the sugar, with liberty to sell the same, and account to them for the proceeds, until the amount of drafts drawn on Schroder and Boninger, of London, in pursuance of the letter of credit, and accepted by them against the cargo of the "Francis Satterly," should be satisfactorily provided for. The cargo was sold to McKeen, Newholt & Co., of Philadelphia, through the defendants as brokers, but before it was all delivered, Stirling, Ahrens & Company failed on the 26th August. The appellants were then, on the 27th August, authorized to deliver the balance of the cargo, and to draw for the proceeds. Upon receipt of the money from the purchasers, the appellants retained out of it the amount due them by Stirling, Ahrens & Co., for brokerage in selling other cargoes imported by them, and not belonging to the appellees, and the question is, had they a right to do so. Brokers do not usually possess the right of general lien, though, like other agents, they may be in a situation to exercise the right of particular lien. The reason of this seems to be that the distinguishing feature in the character of broker is, that in general he is not entrusted with the possession of the property respecting which he is employed to act in that capacity, but that his business is merely that of a negotiator between the contracting parties. The right of lien is a right in one person to retain that which is in his possession belonging to another, until certain demands of the party in possession are satisfied, and it

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presupposes that the person making the claim, has possession of property belonging to the person against whom the claim is made. But it is evident that, from the nature of a broker's occupation, he has not, under ordinary circumstances, any property of his principal in his hands, on which the right of lien can attach. See *Russell on Factors and Brokers*, 193, *marg.*, (48 *Law Lib.*, 127.) In the case before us, the property in the sugar was clearly in the appellees under the letter of credit, and Stirling, Ahrens & Co's trust receipt. But even if a broker possessed a right of lien, it is clear that the debt in respect of which he claims the right, must be due from the person whose property he seeks to retain by virtue of it, and therefore if he know, or have reason to believe that the person by whom he is employed, is himself merely an agent, he will not be allowed to retain property of that agent's principal which may come to his hands in the course of his employment, for a debt due from the agent himself. *Russell on Factors and Brokers*, 200 (*marg.*) and cases there cited. Mr. Lehr and Mr. Ahrens both swear that Mr. Hoogewerff was informed by them, on the 26th day of August, before he was authorized to deliver the remainder of the "Satterly's" cargo, and to receive the proceeds, that the sugar was the property of the appellees. Mr. Hoogewerff swears that he thinks that he was so informed later than the 26th August, but we agree with the learned Judge, before whom this case was tried below, that it is immaterial whether he had or had not such notice. The property in the sugar being in the appellees, the appellants had no lien upon it for, and could not retain out of it, the amount due by Stirling, Ahrens & Co. for brokerage effected for them. The only claim the appellants could legally assert against the cargo of the "Satterly," or its proceeds, was for the amount of brokerage due them, for effecting a sale of that particular cargo. The judgment appealed from will be affirmed.

*Judgment affirmed.*

Decided 1st March, 1877.)

WILLIAM O. SPRIGG *vs.* THE WESTERN TELEGRAPH  
COMPANY, WILLIAM ORTON, and others.

*Injunction—Corporations—Telegraph Company—Question as to how far a Telegraph Company created by Special Act of the Legislature, can be re-organized under the General Corporation Act of 1868, ch. 471.*

In all *ex parte* applications for injunction, it is the duty of the complainant to make a *full and candid disclosure* of all the facts within his knowledge, touching the subject-matter in regard to which relief is prayed. There must be no *misrepresentation*, or *concealment*, or *keeping in the back-ground*, of important facts of which the Court ought to be advised.

Where a complainant, seeking an injunction, omits from his bill material facts in regard to which he had knowledge, or was put upon the inquiry, and had the means of ascertaining, and ought to have ascertained them before instituting the proceeding, such omission is, in itself, a sufficient ground to disentitle him to this summary process of the Court.

The Western Telegraph Company was incorporated by a special Act of Assembly, 1846, ch. 39, for a period of thirty years, and the Legislature reserved to itself the right to alter and amend the charter at pleasure. Shortly before the expiration of this charter, steps were taken by a majority of the stockholders to re-organize under the General Corporation Act of 1868, ch. 471. On a bill filed by a stockholder for an injunction to restrain this re-organization, it was HELD :

- 1st. That there was nothing in the Act of 1846, to prevent a majority of the stockholders from organizing under the Act of 1868.
- 2nd. That the reservation by the Legislature of the power to alter and amend its charter at pleasure, became part of the contract between the State and the corporators, and the exercise of it in no manner impaired the obligation of a contract within the meaning of the Constitution of the United States.
- 3rd. That the amended or substituted charter may be conferred by a special Act, or by a general law authorizing the corporation to organize under such general law; and if such amended or substituted charter is accepted by a

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majority of the stockholders, such acceptance is binding upon all the members of the corporation, unless the original purpose of the corporation be changed by such charter.

4th. That the alteration of the charter may be as lawfully made by the substitution of a new charter as by the amendment of the old, provided such substituted charter be germane, and necessary to the objects and purposes for which the company was organized.

5th. That the proposed organization under the Act of 1868, is not liable to the objection, that it will effect a radical and fundamental change, in the objects and purposes for which the original company was chartered.

6th. That the mere grant of additional powers auxiliary to the original design does not constitute such radical and fundamental change.

#### APPEAL from the Circuit Court of Baltimore City.

The Western Telegraph Company was created by special Act of the Legislature of Maryland, 1846, ch. 39, to continue for a period of thirty years. And the Legislature reserved to itself the right to alter and amend the charter at pleasure. Shortly before the expiration of this charter, steps were taken by a majority of the stockholders to re-organize under the General Corporation Act of 1868, ch. 471. The present bill was filed by one of the stockholders to obtain an injunction to prevent said re-organization, the Western Telegraph Company and the stockholders charged with attempting to effect said re-organization, being made the defendants.

The application for the injunction was set down for hearing, an answer was filed by the defendants, and the Court, (PINKNEY, J.,) after a hearing upon the bill, answer and exhibits, passed an order refusing the injunction.

From this order the present appeal is taken by the complainant. The case, in other respects, is sufficiently stated in the opinion of the Court.

The cause was argued before STEWART, GRASON, MILLER, ALVEY and ROBINSON, J.

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*John K. Cowen and John H. B. Latrobe*, for the appellant.

Without the consent of all the stockholders, the action of the new company under these circumstances would be equivalent to taking the property of an individual without his consent, and to give to the Act of 1868, ch. 471, such a construction would make it operate to impair the obligation of a contract, and therefore be unconstitutional. See *Green's Brice's Ultra Vires*, 539, *et seq.*, and note pp. 543-4-5.

A fundamental change in the charter of a corporation by act of a majority of the stockholders will be prevented by an injunction at the suit of an individual stockholder, although such action is authorized by express Act of the Legislature. *Stevens vs. Rutland & Burlington R. R. Co.*, 29 *Vermont*, 547.

If the Legislature intended by the Act of 1868, to alter the charter of 1846, ch. 39, in the exercise of the right to "alter or annul" given by the 17th section, then the Act of 1868 would be unconstitutional, because it would impair the obligation of a contract, "it would compel a dissenting stockholder to transfer his interest, because two-thirds of his co-stockholders desired to do so." *O'learwater vs. Meredith*, 1 *Wallace*, 25-39-40.

In this last case, under the general railroad law of Indiana, passed May 11th, 1857, the Cincinnati, Cambridge and Chicago Short Line R. R. Co., was organized. There was no provision in the Act permitting railroad corporations to consolidate their stock, but it did contain the following clause: "This Act may be amended or repealed at the discretion of the Legislature." A general Act, passed February 23rd, 1853, authorized all railroad companies in Indiana to unite and consolidate their roads with any other road or roads, constructed, or in the process of construction. It was held, that "this Act of the Legislature of Indiana, was permissive and not mandatory. That

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in conferring the authority to consolidate, the Legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation. Even if the Legislature had manifested a purpose to do so, the Act would have been illegal, because it would have impaired the obligation of a contract." "If a majority of the stockholders of a corporation, of which he (the plaintiff,) was a member, had undertaken to transfer his interest against his wish, they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it, on the surrender of his stock in the old company." See pp. 40, 41.

The following authorities sustain the above views: *McCray vs. Junction R. R. Co.*, 9 *Indiana*, 358; *Bove vs. Junction R. R. Co.*, 10 *Indiana*, 93; *Oldtown & Lincoln R. R. Co. vs. Vezie*, 39 *Maine*, 571; *Zabriskie vs. Hackensack R. R. Co.*, 3 *C. E. Green*, 178; *Kenosha & Rock Island R. R. Co. vs. Marsh*, 17 *Wisconsin*, 17; 7 *C. E. Green*, 260, &c., and argument of counsel.

In this last case, a corporation was organized to build a railroad from A. to B. By another Act of the Legislature, amending its charter, it was authorized to make a road from A. to C. Held, that dissenting stockholders were released from their obligations by this attempt to change the charter of the company. *Redfield on R.*, vol. 1, p. 196, sec. 36; *Same*, vol. 2, p. 656, sec. 252; *Am. Law Rev.*, *N. S.*, vol. XI, p. 1, &c.

The power to alter or annul the Act of incorporation may authorize the taking away of a charter, but does not authorize the imposition of a new charter and the creation of a new company. *Zabriskie vs. Hackensack & New York R. R. Co.*, 3 *C. E. Green*, 178; *Black vs. Delaware & Raritan Canal Company*, 9 *C. E. Green*, 463.

The defendants' answer admits the equities set forth in the bill, but seeks to avoid them by setting up new matter.

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On an application for a preliminary injunction, it is the rule of equity, that the new matter cannot be considered until proved in the cause. *Hardy vs. Summers*, 10 G. & J., 316; *Barroll's Chancery Practice*, 303; *Ringgold vs. Ringgold*, 1 H. & G., 12; *Glenn, Adm'r vs. Hebb*, 12 G. & J., 271; *Salmon vs. Cluggett*, 3 Bl., 141.

*Attorney General Gwinn*, for the appellees.

The answer filed in this case was responsive in all its parts, to the substance of the bill—that is to say, to the allegations expressed and implied by the bill; and ought, upon the hearing on bill and answer, to have been taken as true. *Dorsey vs Hagerstown Bank*, 17 Md., 412. It fully denied all the expressed and implied equities of the bill.

The replication, filed by the appellant, had no operation whatever upon his motion for an injunction. Upon the hearing of a motion for an injunction, upon bill and answer, a replication cannot be considered. If the answer is responsive, and denies the equities of the bill, it must be taken as true, whether a replication be filed or not.

It is moreover the duty of a party asking for an injunction, to bring under the notice of the Court, all facts material to the determination of his right to that injunction. It is no excuse for him to say that he was not aware of the importance of any facts, which he has omitted to bring forward. And if it appears by the defendant's answer, that there are questions of fact, or law, on which the right of the complainant to the injunction depends, the Court, even if not *controlled*, but only *cautioned*, by the answer, ought to refuse a preliminary injunction. The jurisdiction of the Court in granting *ex parte* injunctions, is not a matter which can be demanded of right by a complainant, but rests within the sound discretion of the Court; and the power ought to be exercised with extreme caution. *State vs. Jarrett*, 17 Md., 330; *Nusbaum vs. Stein*, 12



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*Md.*, 318; *Reddall vs. Bryan*, 14 *Md.*, 476; *High on Injunctions*, page 4; *Bonaparte vs. Camden & Amboy R. R. Co.*, *Baldwin*, 217, 218. Because the power is a hazardous one, which may be used to the injury of others, and a strict hand should be held over those who come with such applications. 2 *Joyce on Injunctions*, 1034; *Attorney General vs. Mayor of Liverpool*, 1 *Myl. & C.*, 13 *Eng. Ch. Rep.*, 343.

The doctrine stated in *Dalglish vs. Jarvie*, 2 *Mac. & G.*, 242, 243, is precisely identical with that enforced by the cases in Maryland, and with other authorities. These have held that if it appears by the bill that an unreserved and candid statement of the matters actually in controversy, has not been made, an injunction ought to be refused. *Keighler vs. Savage Manuf'g Co.*, 12 *Md.*, 383; *Johnson vs. Glenn*, 40 *Md.*, 207; *Reddall vs. Bryan*, 12 *Md.*, 476; *Shoemaker vs. Nat. Mech. Bank*, 31 *Md.*, 396; *Canton Company vs. Northern Central R. W. Company*, 21 *Md.*, 398; *Kerr on Injunctions*, 1 *Am. Ed.*, 608, and cases cited; *High on Injunctions*, sec. 11; 2 *Joyce on Injunctions*, 1034.

It is the duty of the Court to weigh and balance the inconveniences which would arise from granting or refusing the injunction prayed; and to refuse the injunction, if greater mischiefs would result from granting than refusing it. *Attorney General vs. Mayor, &c. of Liverpool*, 1 *Myl. & Cr.*, 13 *Eng. Ch. Rep.*, 208; 2 *Joyce on Injunctions*, 226; *Kerr on Injunctions*, 210; *High on Injunctions*, sec. 13.

It would seem to be clear, upon principle and authority, that when a charter is granted to a corporation, and the Legislature reserves, in the charter itself, the power to amend such charter, or to repeal it, the Legislature may, at its pleasure, wholly revoke the entire grant and so dissolve the corporation. *Miller vs. State*, 15 *Wallace*, 497; *Tomlinson vs. Jessop*, 15 *Wallace*, 457; *County Commis-*

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*sioners of Washington County vs. Franklin R. R. Co.*, 34 *Md.*, 161, 162, 163; *State vs. Northern Central R. R. Co.*, 44 *Md.*, 165; *Mumma vs. Potomac Co.*, 8 *Peters*, 286; *Penn. College Cases*, 13 *Wallace*, 218.

If the Legislature may alter or annul an Act of incorporation at its pleasure, when the corporation has agreed that it may exercise the power, it may assuredly, with the consent of the corporation, make the alteration as lawfully by the substitution of a new charter as by the amendment of the old charter.

If the new charter is germane, and necessary to the purposes for which the old charter was granted, and is accepted by the corporation, it is as obligatory upon all the members of the corporation, as if it were an amendment to the old charter. It has, in law, only the force and significance of an amendment.

The amended or substituted charter may be conferred by special Act or by general law, authorizing the corporation to incorporate itself under such general law for the continued performance of the functions, with which it was entrusted under its special charter.

Such legislation "is not one of those fundamental radical changes, which diverts the funds from the original purpose to which they were dedicated, or is manifestly prejudicial to the stockholder, but comes within that class of cases, in which the change was held to be auxiliary to the original object of the incorporation, and beneficial to the stockholders." *Taggart vs. Western Maryland R. R. Co.*, 24 *Md.*, 597; *Clearwater vs. Meredith*, 1 *Wallace*, 40.

If the amending law, or the new charter, or the general law, provides for the acceptance of such changes, so authorized by a majority of the stockholders of a corporation, and such majority desires to accept such altered powers in due form, no minority of stockholders can object. *Korn & Wisemiller vs. Mutual Insurance Society*, 6 *Cranch*, 192; 2 *Cond. Rep. U. S.*, 345; *White vs. Syracuse & Utica R.*

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*R.*, 14 *Barb.*, *N. Y.*, 559; *Joslyn vs. Pacific Mail S. S. Co.*, 12 *Abbott's Pr. Rep.*, *N. S.*, 333; *Corry vs. Scott*, 54 *Penna. St.*, 270; *Buffalo & N. Y. City R. R. Co. vs. Dudley*, 14 *N. Y.*, 4 *Kernan*, 349; *Bishop vs. Brainerd*, 28 *Conn.*, 289; *Attorney General vs. Davy*, 2 *Atk.*, 212; *Central R. R. vs. Georgia*, 2 *Otto*, 671.

The will of a majority of a corporation must govern in the adoption of an amendment to their charter, unless there be fraud, or the original purpose of the corporation be entirely changed by the amendment. *Sprague vs. Illinois River Railroad Co.*, 19 *Ill.*, 174; *Joy vs. Jackson, &c., Co.*, 11 *Mich.*, 155; *White vs. Syracuse & Utica R. R. Co.*, 14 *Barb.*, 559; *Troy & Rutland R. R. Co. vs. Kerr*, 17 *Barb.*, 581; *Clearwater vs. Meredith*, 1 *Wallace*, 40.

ROBINSON, J., delivered the opinion of the Court.

This is an application by the appellant, a stockholder of the Western Telegraph Company, for an *injunction* to restrain the appellees and other stockholders, from organizing under the Act of 1868, ch. 471, known as the General Corporation Law of this State.

It can hardly be necessary to repeat what we have so often said, that in all *ex parte* applications of this kind, where the Court is asked to interfere by a process so summary in its character, and so liable therefore to be abused, it is the duty of the complainant to make a *full and candid disclosure* of all the facts within his knowledge, touching the subject-matter in regard to which relief is prayed. There must be no *misrepresentation*, or *concealment*, or *keeping in the back-ground*, important facts, of which the Court ought to be advised, otherwise this strong arm of the law, which is interposed only to prevent positive and substantial injury, may become the instrument of wrong and oppression. *Keighler vs. Savage Manuf'g Co.*, 12 *Md.*, 383; *Shoemaker vs. Nat. Mech. Bank*, 31 *Md.*,

491; *Canton Company vs. Northern Central R. R. Co.*, 21 Md., 398; *Kerr on Injunctions*, 608, and cases cited; 2 *Joyce on Injunctions*, 1034.

In *Dalglish vs. Jarvis*, 2 Mac. & G., 242, the law on this subject is thus strongly stated by Baron ROLFE:

“The application for a special injunction, is very much governed by the same principles which govern insurance matters, which are said to require the utmost degree of good faith, *uberrima fides*. In cases of insurance, a party is required to state not only all matters within his knowledge, which he believes to be material to the question of insurance, but all which in point of fact are so. So, if a party applying for a special injunction, abstains from stating facts which the Court thinks are material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant.”

Now, it is obvious, the complainant has not, in this case, stated fully and fairly all the facts within his knowledge, in regard to the objects and purposes of the appellees in organizing a new company under the Act of 1868.

He alleges in the bill, that he is the owner of two shares of stock of the Western Telegraph Company, of the par value of one hundred dollars each, upon which he has for many years received semi-annual dividends, and that the appellees and other stockholders are about to create a new corporation under the Act of 1868, and to transfer to the company thus formed, all the rights and property of the Western Telegraph Company, and thus compel the complainant to become a member of the new company. That the formation of the company as proposed, would subject him, against his consent, to obligations different from those assumed by him as a corporator in the old company, and to risks which he never contemplated.

But he does not state that the old company was chartered in 1846, for a term of thirty years, and that the period thus fixed was about to expire, and that the Legislature

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had expressly reserved the right to alter or amend its charter at pleasure. Nor does he state the important fact, that in the contract made between the company and the Baltimore and Ohio Railroad Company, and under which it acquired the license to construct, maintain, and operate a line of magnetic telegraph, upon and within the limits of said railroad, it was stipulated among other things, that in the event of a dissolution of the telegraph company, or a suspension of operations, either voluntary or in consequence of legal process, the railroad company was authorized to take charge of the telegraph line until the company should resume active operations.

He also omits to state, that in 1859, the Telegraph Company leased all its lines to the American Telegraph Company for a period of thirty years, at a rental of ten thousand, five hundred and seventy-six dollars per year, free from all deductions for expenses, wear and assessments, and that this rental constituted the sole income from which the complainant and other stockholders derived the semi-annual dividends on their stock.

These *material facts*, it is but fair to presume, were known to the complainant, or if he had not actual knowledge, he was put upon the inquiry and had the means of ascertaining, and ought to have ascertained them before instituting a proceeding of this kind. And he not only fails to state these facts, but leaves the Court to infer, that if no steps were taken by the appellees and other stockholders to organize under the Act of 1868, the old company would still retain and exercise the rights and franchises granted by its charter, and would still remain in possession of its property, and that he and other stockholders would continue to receive the semi-annual dividends on their stock, or in the event of a dissolution, the property would be distributed among the stockholders. The failure on the part of the complainant to state these facts, so important and material to enable the Court to act

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with due regard to the rights and interests of all parties, is in itself a sufficient ground to disentitle him to this summary process of the Court. *Reddall vs. Bryan, et al.*, 14 Md., 476.

But in addition to this, when the bill is read in connection with the answer and exhibits, it is difficult to imagine on what principles of equity the complainant can ask the interference of the Court, because the organization under the Act of 1868, was absolutely necessary to prevent the property of the company from passing into the possession and under the control of the railroad company, and also necessary to enable the telegraph company to perform its covenants under the lease from which its entire income was derived.

Independent of these objections, we deem it proper to add, that we find nothing in the Act of 1846, incorporating the Magnetic Telegraph Company to prevent the appellees, and others constituting a majority of the stockholders from organizing under the Act of 1868. In conferring corporate powers upon the company, the Legislature expressly reserved the right to alter or amend its charter at pleasure. This reservation became part of the contract between the State and the corporators, and the exercise of it in no manner impairs the obligation of a contract, within the meaning of the Constitution of the United States. *State vs. Northern Central R. R. Co.*, 44 Md., 165; *Miller vs. State*, 15 Wallace, 497; *Tomlinson vs. Jessup*, 15 Wallace, 457.

And it is equally clear, we think, that this amended or substituted charter may be conferred by a special Act, or by a general law authorizing the corporation to organize under such general laws; and if such amended or substituted charter is accepted by a majority of the stockholders it is clear upon principle and upon authority, that such an acceptance is binding upon all the members of the corporation, unless the original purpose of the corporation be

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changed by such charter. *Korn & Wisemuller vs Mutual Ins. Co.*, 6 *Cranch*, 192; *Central R. R. Co. vs. Georgia*, 2 *Otto*, 671; *White vs. Syracuse & Utica R. R.*, 14 *Barb.*, *N. Y.*, 559; *Joslyn vs. Pacific Mail S. S. Co.*, 12 *Abbott Pr. Rep.*, *N. S.*, 333; 4 *Kernan*, 349; *Bishop vs. Brainerd*, 28 *Conn.*, 289.

If then the Legislature has the power to alter or annul the charter of the Telegraph Company, because the corporation has agreed it may exercise this power, it may assuredly make the alteration as lawfully by the substitution of a new charter as by the amendment of the old charter, provided such substituted charter be germane, and necessary to the objects and purposes for which the company was organized.

The inquiry then is, whether the proposed organization under the Act of 1868, is a radical and fundamental change in the objects and purposes for which the original company was chartered. We have examined the provisions of the Act of 1868, in connection with Act of 1846, incorporating the Telegraph Company, and are of opinion that the proposed organization is not liable to this objection. On the contrary, the number of shares of the capital stock, the property, business, objects and purposes of the company remain the same, and under the new charter each stockholder of the old company will be entitled to an equal number of shares in the new, and of the same par value.

It is true, additional powers are conferred upon the company by the Act of 1868, the power for instance to consolidate with and lease other lines, but whatever conflict there may be in the decided cases as to what constitutes a fundamental change in the charter, they all agree that the mere grant of additional powers auxiliary to the original design, is not liable to that objection. *Clearwater vs. Meredith*, 1 *Wallace*, 25; *Green's Brice's Ultra Vires*, 80, 84, and cases cited. Without reviewing the several cases relied on by the appellant, it is sufficient to say, that upon an

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examination of them, it will be found that the changes were radical and fundamental, or that the Legislature had not reserved the power to amend and alter the charters.

In any aspect therefore, in which this case may be viewed, we are of opinion, that the injunction was properly refused.

*Order affirmed.*

(Decided 1st March, 1877.)

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JOHN MERRYMAN, Trustee, and THOMAS D. COCKEY  
and Wife vs. VINCENT T. SHIPLEY.

*Construction of Agreement—Express and implied Covenant.*

G. as trustee for C., and R. in his own right, were the owners in fee of adjacent lands in Baltimore County. R. having certain limestone quarries on his land, by lease made between G. of the first part, C. of the second part, and himself of the third part, leased from G. and C. certain quarry rights on their land for the period of 15 years, including certain water works, &c., on the lands of the lessors. There was a clause in the lease by which the lessors granted to R., his heirs and assigns, owners of the adjoining tract of land, the *perpetual* right and privilege, after the determination of said lease, to use one-fourth of the water power produced by means of said water works, for the sole purpose of pumping out water from the quarries then or thereafter to be opened on R's land, the trustee reserving the other three-fourths of said water power for such use as he, his heirs, successors or assigns might deem proper for the purposes of the trust. And it was thereby expressly agreed, "that after the expiration of the exclusive right to use the whole of said water power hereinbefore granted, and demised for fifteen years aforesaid, whether by effluxion of time, surrender or otherwise, that the expenses of keeping and maintaining said water power fit for use; and of cleaning out the race and repairing the dam, trestle work, tail-race, water wheel, mill house, &c., shall be borne by the party of the first part hereto, his heirs, successors and assigns, and by the party of the third part



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his heirs and assigns, owners of the said lands, marked on said plats as William Robinson's land, in the proportion of three-fourths to the party of the first part, and one-fourth to the party of the third part." The term of the lease having expired, and the water works having been abandoned, and permitted to fall into decay with the consent of all parties, the trustee and *cestui que trust* sued the assignee of R's land in covenant to recover *one-fourth part of the estimated costs of repairs.* **Held:**

- 1st. That the stipulation in the lease in regard to the proportion of expense to be borne by the respective parties, could not be construed as an *express agreement on the part of R. to make the repairs.*
- 2nd. That there was nothing on the face of the lease from which such agreement could be implied.

**APPEAL from the Superior Court of Baltimore City.**

The appellants sued the appellee as assignee of William Robinson, in an action of covenant and declared against him as follows:

That whereas, heretofore, to wit, on the 10th day of April, eighteen hundred and fifty-seven, at Baltimore County aforesaid, by a certain indenture then and there made between the said William Robinson of the one part, and one William W. Glenn, (of whom the said John Merryman is assignee or successor,) and the said Thomas Dye Cockey and Sally, his wife, of the other parts, first and secondly respectively, the counter part of which said deed, sealed with the seal of the said William Robinson, the said plaintiffs now bring here into Court, the date whereof is the day and year aforesaid, the said William W. Glenn, Thomas Dye Cockey and Sally, his wife, did grant and convey to the said William Robinson, his heirs and assigns forever, owners of the lands marked on the plat accompanying and being a part of said deed and annexed thereto, as "William Robinson's Land," the full, perfect and perpetual right and privilege to use the one-fourth part of the power produced by the water flowing as before mentioned in said deed and shewn on said plat annexed thereto, through or by means of the artificial

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trestle works, tail-race, dam, water wheel and mills, as aforesaid mentioned in said deed, for the sole purpose of pumping out water from the quarries, now or hereafter to be opened on the lands of the said William Robinson, marked on the said plat thereto annexed as "William Robinson's Land," and which pumping will, and is so intended, benefit the quarries on the said lands of the parties of the first and second parts thereto, inasmuch as the lands of the said William Robinson are lower than the said lands of the parties of the first part thereto—the party of the first part thereto reserving the other three-fourths of said water power, and the benefit of the tail-race aforesaid, for such uses as he, his heirs, successors or assigns, may see proper to put the same, for the uses of his trust aforesaid.

And it was further expressly agreed, that after the expiration of the exclusive right to use the whole of said water power thereinbefore granted and demised for fifteen years, as aforesaid mentioned in said deed, whether by — of time, surrender or otherwise, that the expenses of keeping and maintaining said water power fit for use, and of cleaning out the race and repairing the dam, trestle work, tail-race, water wheels, mill house, &c., &c., shall be borne by the party of the first part thereto, his heirs, successors and assigns, and by the said William Robinson, his heirs and assigns, owners of the said lands marked on said plat as "William Robinson's Land," in the proportion of three-fourths of the party of the first part thereto, and one-fourth to the said William Robinson, their respective heirs, successors and assigns, as by the said deed, reference being thereto had, will, amongst other things, more fully appear. By virtue of which said deed the said William Robinson entered into and upon all and singular the demised premises, rights and privileges, with the appurtenances, and was thereof possessed; and the said plaintiff further saith, that all the rights, privileges,

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and advantages, agreements, covenants and undertakings of the said William Robinson, have since devolved, been assigned, transferred, and made over to the said defendant, Vincent P. Shipley; and the said plaintiff further saith, that afterwards, to wit, on the eleventh of March, 1869, and from and after the said period last mentioned, the said water power, race, dams, trestle work, tail-race, water wheels, mill house, &c., &c., in said deed mentioned, became and were greatly ruinous, and for want of needful necessary reparations and amendments of the same, and keeping and maintaining the said water power fit for use, and cleaning out the race and repairing the dams, &c., &c. Yet the said defendant hath not repaired and amended the same, nor kept and maintained the same fit for use, nor hath he, the said defendant, contributed his quota of one-fourth of the expense for pumping, &c., nor any part thereof; but on the contrary, hath suffered and permitted the same, and every part thereof, to remain and continue so ruinous and unfit for use, from thence hitherto, to wit, at the county aforesaid, contrary to the form and effect of said deed, and of the said covenant of the said William Robinson, in that behalf made as aforesaid; whereby the said plaintiffs say they have damage, and are worse, to the value of five thousand dollars, and therefore they bring suit, &c.

The defendant prayed and obtained oyer of the lease, (the contents of which are sufficiently set forth in the opinion of the Court,) and then filed the following pleas:

"1. That after the making of the said indenture in the declaration mentioned, and before the time of the said alleged breach of agreement, and before the said assignment from the said Glenn to the said John Merryman, the said William Robinson surrendered to the said William W. Glenn, Thomas Dye Cockey, and Sally, his wife, the said demised premises, and all the residue then to come and unexpired of the said term of years, and all the right,

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privileges and advantages by the said indenture granted or conferred to or upon the said William Robinson; and the said William W. Glenn, Thomas Dye Cockey, and Sally, his wife, then accepted such surrender and took possession of the said premises.

“2. And for a second plea, the defendant says, that before the alleged breach of the said agreement in the said indenture contained, and before the said assignment by the said William W. Glenn to the said John Merryman, and before the defendant acquired any interest in the said lands, or any of them, the said demised premises, and all the residue of the said term of fifteen years, then to come and unexpired therein, and all the right and privileges by the said indenture granted or conferred to or upon the said William Robinson, his heirs or assigns, were duly surrendered by the said William Robinson, to the said William W. Glenn, Thomas Dye Cockey, and Sally, his wife, by act and operation of law—that is to say, by the said William Robinson then giving up to the said William W. Glenn, Thomas Dye Cockey, and Sally, his wife, and they, the said Glenn, Thomas Dye Cockey, and Sally, his wife, then accepting from the said William Robinson, the possession of the said demised premises, and all the said rights and privileges, with the intention respectively of then putting an end to the said term.

“3. And for a third plea, the said defendant says, that the said term of years in the said indenture mentioned, was not, nor was any part thereof, nor were the said rights and privileges, nor any of them by the said indenture, demised or granted to the said William Robinson, in, upon, or in respect to said lands of the plaintiffs, ever assigned, transferred or made over to the defendant, nor was he ever at any time heretofore, nor is he now possessed thereof, or of any right, interest or estate whatever, in, to or upon the said lands of the plaintiffs, or any part thereof, under the said indenture in the said declaration mentioned.

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“4. And for a fourth plea, the defendant says, that the said rights, privileges, advantages, agreements, covenants and undertakings of the said William Robinson, in the said declaration mentioned, have not, nor have any of them devolved, been assigned, transferred or made over to the defendant, as in the declaration alleged.

“5. And for a fifth plea, the defendant says, that no expenses of keeping or maintaining said water power fit for use, as in said indenture provided, or of cleaning out the said races, or repairing the said dam, trestle work, tail-race, water wheels, mill house or other things in said indenture mentioned, have been made or incurred by the plaintiffs or otherwise.

“6. And for a sixth plea, the defendant says, that the said water power, races, dam, trestle work, water wheels, mill houses, &c., did not, nor did any of them become ruinous for want of needful reparations or amendments of the same, or of keeping or making the said water power fit for use, or of cleaning out the said race or repairing the said dam, &c., after the purchase by the defendant of the said land formerly owned by the said William Robinson; and the said term of years, quarry rights, and other rights and privileges in and by the said indenture, demised, leased and granted to the said William Robinson, in and upon, and in respect to the said lands of the plaintiffs, were not, nor were any of them ever assigned, transferred or conveyed to the defendant.

“7. And for a seventh plea, the defendant says, that by the mutual consent and respective act of the said William W. Glenn, trustee, (before said alleged assignment from him to the said Merryman,) the said Thomas D. Cockey, and Sally, his wife, and of the said William Robinson, all the said water works, race, water wheels, mill house, trestle work, rights, privileges and easements in the declaration mentioned, were completely and permanently abandoned, and by reason thereof, the defendant afterwards was led to

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believe no such supposed rights, privileges, servitudes or easements existed, and was induced by said abandonment to purchase the said land so formerly owned by the said William Robinson, for a large and valuable consideration paid by the defendant.

"8. And for an eighth plea, the defendant says, that before the happening of the alleged grievance in the declaration complained of, the plaintiffs wholly obstructed the said water power, and the flow of water in and upon said artificial race, trestle work and tail-race, and prevented the defendant from enjoying the same, or any part or share thereof, and deprived him of all benefit and advantage of the same, and of every of them."

The plaintiffs demurred to these pleas, and the Court below, (DOBBIN, J.,) for the reason that the declaration did not contain a sufficient cause of action overruled the demurrer, and gave judgment for the defendant. The plaintiffs appealed.

The cause was argued before BARTOL, C. J., GRASON, MILLER and ALVEY, J.

*J. T. B. Dorsey*, for the appellants.

*A. W. Machen*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

This is an action of covenant, on a deed of lease made the 10th day of April, 1857, between W. W. Gleen, trustee of the first part, Thomas D. Cockey and wife of the second part, and William Robinson of the third part. By it, the parties of the first and second parts, demised or granted to Robinson, certain quarry rights in the land of the parties of the first and second parts, for a term of fifteen years, subject to the payment of a rent or royalty, and with the privilege to the lessee, of putting an end at any time to the term by surrender.

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The deed also recited, that the use of certain water works, race, water wheel and trestle work, existing on the land of the parties of the first and second parts, went with the quarry rights, and should be exclusively used by the lessee during the continuance of the term. And there was a clause by which it was declared that after the determination of the said quarry rights, &c., so granted and demised for the term of fifteen years, the party of the first part, (the trustee, with the consent of the parties of the second part,) granted to said Robinson, his heirs and assigns, owners of a tract of land adjoining, the *perpetual* right and privilege to use one-fourth of the water power, produced by means of said water works, for the sole purpose of pumping out water from the quarries, then or thereafter to be opened on Robinson's land, the party of the first part reserving the other three-fourths of said water power, for such uses as he, his heirs, successors or assigns might deem proper, for the uses of his trust. And in the last clause of the deed preceding the *in testimonium* clause, was the following stipulation :

"And it is hereby expressly agreed, that after the expiration of the exclusive right to use the whole of said water power hereinbefore granted and demised for fifteen years aforesaid, whether by effluxion of time, surrender or otherwise, that the expenses of keeping and maintaining said water power fit for use, and of cleaning out the race and repairing the dam, trestle work, tail-race, water wheel, mill house, &c., shall be borne by the party of the first part hereto, his heirs, successors and assigns, and by the party of the third part hereto, his heirs and assigns, owners of said lands, marked on said plat as William Robinson's land, in the proportion of three-fourths to the party of the first part, and one-fourth to the party of the third part."

The term of the lease, fifteen years, having expired, and the water works having been abandoned and permitted

to fall into decay, with the consent of all parties, this suit is brought to recover of the defendant, assignee of Robinson, *one-fourth part of the estimated cost of repairs.*

There is no averment in the declaration, either of the making of the repairs by the plaintiffs, and the defendant's refusal on demand to pay one-fourth of the expense; or the plaintiffs' readiness to repairs and the defendant's refusal to participate therein, and it is clear therefore, the only ground on which the action can be maintained is an agreement, either express or implied, on the part of Robinson to make such repairs.

The stipulation in the latter clause of the deed in regard to the proportion of expense to be borne by the respective parties, cannot certainly be construed as an *express agreement on the part of Robinson himself, to make the repairs*; nor do we find anything, either in the recitals or covenants, to support such a construction.

The inquiry then is, whether there is anything on the face of the deed from which an agreement can be fairly implied.

Now it appears by the recitals, that the parties owned adjoining tracts of land, through which flowed two streams of water, and the construction of water works was necessary in order to use said streams for the purpose of pumping water out of the quarries, which were then being or about to be worked on the two properties.

These water works were to be constructed by Robinson, and to be used by him exclusively during the term of the lease, and upon its expiration, either by the effluxion of time or otherwise, the use of *one-fourth of the water* was reserved to himself, his heirs and assigns forever.

Then follows the covenant by which the parties of the first and second part granted to Robinson, for fifteen years, the exclusive right to quarry marble and alum limestone on the land of said parties, upon the payment of a certain stipulated rent or royalty; and they also covenanted upon



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the *expiration of the term* of fifteen years, that Robinson, and his heirs and assigns, should have the privilege of using *one-fourth* of the water produced by said water works.

The deed then closes with a stipulation in regard to the proportion of expense to be borne by each of the parties, in keeping the water works in repair.

We know of no rule of construction by which an agreement can be implied on the part of Robinson himself to keep the water works in repair after the expiration of his term of fifteen years. The works were upon the land of the plaintiffs and they were entitled to three-fourths of the water power, and were bound to pay three-fourths of the expense in keeping up the repairs, and there is as much reason for implying a contract on their part to make such repairs, as there is for implying a contract on the part of Robinson and his assigns. And it is obvious upon the facts stated in the declaration, the defendant would have as good a ground of action against the plaintiff for three-fourths of the estimated expense of the repairs which on all sides had been neglected, as the plaintiffs can have against him for the one-fourth.

So long as the deed remained operative, either party could make the repairs, and then compel the other to pay his proportion of the expense, but we find nothing in the deed to justify the construction contended for by the appellants and to permit them to maintain a suit for one-fourth of the estimated cost of repairs which had not been made.

Being of opinion that the demurrer to the defendant's pleas was properly overruled, for these reasons it becomes unnecessary to decide other questions which were so ably argued on both sides.

*Judgment affirmed.*

(Decided 1st March, 1877.)

JOHN CAREY and MICHAEL MCCOLGAN, trading as  
CAREY & MCCOLGAN *vs.* GEORGE MERRYMAN, and  
others, trading as MERRYMAN, BROTHER & Co.

*Refusal of the Court to sign bill of Exceptions—Instructions  
to the jury.*

The refusal of a Court to sign and seal a bill of exceptions, or to incorporate therein certain evidence, cannot be reviewed by this Court upon a bill of exceptions taken to such refusal, unless the refusal of the Court below is based upon its opinion, that such evidence is irrelevant.

Case where instructions to the jury were held not to be inconsistent with each other.

APPEAL from the Baltimore City Court.

This was an action of *assumpsit* upon the usual money counts, brought by the appellees against the appellants.

*First Exception.*—The witness, B. P. Ledley, having been sworn, was shown certain books, which he stated were yard books, showing the amounts and qualities of bricks furnished each day from the yards of the plaintiffs, and kept by himself; he then proceeded to read from the said books, entries corresponding to the dates of items in the bill of particulars from January 22nd, 1873, to August 21st, 1874.

Upon cross-examination of the same witness, it appeared that the said books were transcripts from smaller books, known as brick books, carried by the foreman of the yards, and made up every evening from memory and loose memoranda in their possession, as compared with the returns made by the carters. The defendants then moved the Court to exclude the testimony of the said witness, as not having been founded on an examination of books of original entries.

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The Court reserved its decision on this motion, until the case should be closed. The plaintiffs then produced the aforesaid brick books, and offered to have the witness go over them as he had done the yard books. The defendant here stated that they waived this, and asked that the said brick books might be given them for the purpose of inspection and cross-examination, which was done.

On cross-examination of the witness, B. P. Ledley, it appeared that the entries in the said brick book were partly in his handwriting, partly in that of his deceased father, who had been foreman of the yards, and made them as such, and partly in that of his brother, George Ledley, who temporarily replaced his father during the latter's illness, and partly in that of J. E. Crangle. The said George Ledley was similarly called as a witness, and the defendants waived his going over the items in his handwriting as they had done in the case of his brother. The aforesaid J. E. Crangle was then called as a witness, and testified from one of the brick books, as to the items on the bill of particulars contained between August 21st and November 28th, 1874.

On cross-examination, he identified all the entries between April 15th and July 23rd, 1874, in the said brick book, as being in his handwriting, and those between July 23rd, 1874, and August 21st, as being in the handwriting of the witness, B. P. Ledley, and stated that the said Ledley kept a duplicate book during the first mentioned period from which the yard books aforesaid were made up. The witness, B. P. Ledley, being recalled, gave the same testimony as the said Crangle as to handwriting, but stated that he had not kept any such duplicate book, and no such duplicate book was produced, though a book was produced containing certain entries in the handwriting of the said Ledley between the above named dates.

The case having been closed, the defendants made the following motions :

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*First Motion.*—The defendants, by their counsel, move the Court to exclude from the consideration of the jury, the testimony of the witness, B. P. Ledley, in regard to the number and quality of the bricks comprised in the items of the bill of particulars filed in this cause, except in so far as the same corresponds with entries in the small books, known as “Brick Books,” put in evidence by the plaintiffs.

*Second Motion.*—The defendants further move to exclude all that portion of the testimony of the said witness, as relates to items of the said bill, charged as for dates between 10th April, 1874, and the 22nd April, 1874, it being admitted both by the said witness, and the witness J. E. Crangle, that the entries for the said dates in the small book, marked with the name of the said Crangle, are in the handwriting of the said last named Crangle, and no other entries relating to the dates aforesaid appearing in any other of the small books aforesaid.

Which motions the Court overruled ; to which action of the Court the defendants except, and pray the Court to sign and seal this bill of exceptions ; to this the plaintiffs objected, as not containing a true statement of the facts of the case, and the Court refused to sign or seal the same, but substituted therefor the following :

*Statement of the Court.*—In the examination of the witness, B. P. Ledley, on behalf of the plaintiffs, a certain book of the plaintiffs, kept by the witness, was used by the witness to refresh his memory, as a book of original entries ; on cross-examination of the witness, it appeared that certain memorandum books kept in pencil, called “Brick Books,” were used in the business of the plaintiffs, and that use was made of these books by the witness in making the entries on said first mentioned book, and it was contended by the defendants that the memorandum books were the books of original entries, and not the said first mentioned book.

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The Court did not decide the point, and the counsel agreed, in order to save the time which would be occupied by a re-examination of the witness, that they would compare the memorandum books and the first mentioned book, and find the items, if any, in which said books differed, and report the same to the Court.

It was the intention of the Court after this report was made, to take further testimony, if necessary, as to the manner in which the respective books were kept, and then to decide the question. The memorandum books were examined by the respective counsel, but no report was made to the Court, and no further proof as to the manner in which the memorandum books and the said original book were kept was offered.

At the close of the testimony, and after the witnesses were discharged, the defendants' counsel made the motions (hereinbefore inserted,) which the Court overruled.

The defendant, McColgan, when on the stand as a witness, said that he had never disputed the delivery of any of the bricks mentioned in the bill of particulars, except those delivered for the houses on Lemon alley, although he had received bills for them as furnished; whereupon the Court remarked to him that if he had said this before, he would have saved a great deal of trouble, and the Court then supposed that all question about delivery of the bricks, except those on Lemon alley, was no longer a matter of dispute.

Geo. Wm. Brown.

The defendants then prayed the Court to so amend the said bill of exceptions, as to make the same include a statement of the testimony of the witnesses, B. P. and George Ledley and Crangle, relative to the various books therein mentioned; which the Court (Brown, J.,) refused to do. The defendants excepted.

*Second Exception.*—The case having been closed, the plaintiffs offered the five following prayers:

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1. If the jury shall find from the evidence, that the plaintiffs paid and furnished to the defendants at their request, the money and bricks charged to the defendants in the bill of particulars filed, and that said bricks were furnished at the prices agreed on between the plaintiffs and defendants, then their verdict must be for the plaintiffs for such amount, if any, as the jury shall find to be due the plaintiffs on said bill with interest in the discretion of the jury.

2. If the jury shall find for the plaintiffs under the plaintiffs' first prayer, and shall further find that the bricks charged to the defendants in said bill of particulars, were delivered on the premises, or at such points as the said defendants directed, then their verdict must be for the plaintiffs; even though they shall further find the bricks were not used by the defendants, provided they shall further find that the bricks furnished were the same bricks purchased from the plaintiffs.

3. If the jury shall find that the pressed bricks, for the front of the ten houses on Mount street, were selected by the defendants at the brick-yard of the plaintiffs, and that said bricks so selected were furnished by plaintiffs to the defendants at the said houses on Mount street, and were afterwards used by defendants or their agents in laying the front wall of the said buildings on Mount street, then they are not to consider, in making up their verdict, any of the testimony in relation to the appearance of the front of the said Mount street buildings.

4. If the jury shall believe from the evidence that the plaintiffs and the defendants made the several contracts as testified to by the plaintiffs, and that by agreement between the plaintiffs and defendants, the selection of the pressed brick for the Mount street houses was left to the defendant, McColgan, and James E. Crangle, foreman of the plaintiffs, and that in accordance with said agreement the said pressed brick was selected by the defendant,

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McColgan, and the witness, Crangle, and the bricks so selected were delivered to the defendants, then the jury must not regard any of the testimony in relation to the variety of the color of the pressed brick in the Mount street front.

5. If the jury shall find that the plaintiffs made a contract with the defendants for the sale of pressed brick to be used in the erection of the front walls of the buildings on Mount and Lombard streets, at and for the sum of \$25 per thousand, and shall further find that it was also agreed between said plaintiffs and defendants that defendants should go to plaintiffs' brick-yard, and that said defendants and plaintiffs' foreman, Crangle, should select the kind and quality of pressed brick, and shall further find that, in pursuance of said contract, the said defendants did go to said brick-yard, and that said defendants and said foreman did select said pressed brick to be used in the erection of said front walls, and that said bricks so selected were furnished by said plaintiffs and used by the defendants in the partial erection of said front walls, and shall further find from the evidence that after said bricks were so used, the defendants did not select with said foreman bricks at said yard for the purpose of completing said fronts, but, on the contrary, depended on the said foreman, Crangle, to select the remaining brick for said front walls, and that said pressed brick were by order of defendants furnished by plaintiffs for the completion of said fronts and used by the defendants, and that the defendants did not object to said bricks until after the completion of said walls, then the jury are not to consider any of the evidence in regard to the color of the bricks in said front walls of the house on Mount street.

And the defendants offered the six following prayers:

1. Under the pleadings in this cause the plaintiffs can only recover for the items charged in their bill of particulars, and only for what the jury shall find from the evi-

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dence was the value of the bricks comprised in the said items, and which bricks the jury shall further find to have been delivered to the defendants in addition to the amount of such other of the said items as do not relate to the sale and delivery of bricks, and which the jury shall find to have been sustained by the proof.

2. If the jury shall find from the evidence that the defendants agreed to purchase from the plaintiffs bricks of a certain quality and color, and shall not find from the evidence that bricks of the quality and color agreed upon were actually delivered by the plaintiffs to the defendants, then the defendants were bound to pay for the said bricks, only what the jury shall find they were worth to the said defendants, unless the jury shall further find that the said defendants agreed to take bricks of the color and quality actually sent by the plaintiffs in place of those originally agreed upon, and unless the jury shall further find that the defendants accepted the said goods from the plaintiffs under the further instructions of the Court.

2 b. The jury are instructed that unless the defendants had an opportunity to perceive the condition of said bricks, by the use of reasonable vigilance during the construction of the said houses, then the said bricks are not to be considered as accepted by the defendants, and if the jury shall find that either by a general custom in the brick-making trade, or by the terms of a special contract between the plaintiffs and defendants, it was the exclusive duty of the brick-maker to provide for the uniformity of the color in the bricks, this fact is to be considered in determining whether the defendants used the due degree of vigilance.

3. That the plaintiffs are bound by the bill of particulars filed in this cause, and can under no circumstances recover more than the balance thereby shown to be due, with interest, in the discretion of the jury.

4. That if the jury shall find from the evidence, that any of the items of the said bill of particulars, relate only



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to bricks not actually delivered by the plaintiffs to the defendants, or that the amounts of any of the said items exceed what the bricks comprised therein were actually worth, or that any of the items in the said bill not relating to bricks have not been sustained by the proof, then the jury must deduct from any verdict they might otherwise find for the plaintiffs, the amount of the class of the said items first above mentioned, and the excess of charge in the class of items secondly above mentioned, and the amount of the class of the said items thirdly above mentioned; and if the aggregate of the said deductions shall exceed in amount the verdict to be found by them under the third instruction, then their verdict must be for the defendants.

5. That the jury may deduct from the amount charged for L. A. brick in the bill of particulars, the amount of such brick, if any, which they may find from the evidence not to have been actually used by the defendants, provided they shall find from the evidence that the plaintiffs' foreman, Mr. Crangle, agreed with the defendants, that they should pay only for such L. A. brick as they actually used; and that Mr. Crangle was authorized by the plaintiffs to make such an agreement.

6. If the jury shall believe from the evidence, that the defendants purchased from the plaintiffs the pressed brick mentioned in the testimony, at the rate of twenty-five dollars per thousand, and shall further believe that the bricks delivered under such purchase by the plaintiffs, were of a different and inferior quality from those purchased, then the jury should deduct from the amount claimed by the plaintiffs, the difference in value between those delivered and the contract price of those purchased; the jury should also deduct from the claim of said plaintiffs, the price charged for any bricks which the jury may believe were not delivered, if they should find that any were not delivered, also the difference between the price

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of any bricks as sold by the plaintiffs, or their agent, and the price charged therefor, if they should find that there is any such difference.

The Court granted all the plaintiffs' prayers, and the third of the defendants, and the fifth and sixth of the defendants' were conceded, and refused the first, second, second (b,) and fourth prayers of the defendants. The defendants excepted.

The jury rendered a verdict for the plaintiffs, and judgment was entered accordingly. The defendants appealed.

The cause was argued before BARTOL, C. J., GRASON, MILLER and ROBINSON, J.

*James McColgan*, and *Charles J. Bonaparte*, for the appellants.

The right to a proper bill of exception is one *ex debito justitiæ*, inherent in every party to a suit at common law in this State, and is indispensable if an appellate tribunal is to be of any use. *Alexander's Br. St.*, 126, 131, 133.

A bill of exceptions must contain "such statement of facts as may be necessary to explain the bearings of the rulings upon the issues or questions involved." *Rules, &c., respecting Appeals, &c., Rule 5*. To disregard this rule is to violate the law. *Const. of Md., Art. 4, sec. 18*.

Even if there was nothing in the exception, the defendants were entitled to have it submitted to this Court, and if they were deprived of that privilege below, they did not have a fair trial. *Const. of Md., Art. 4, sec. 14; Bennett vs. Pen. & Or. S. B. Co., 32 E. L. & Eq., 318; Newton vs. Boodle, 3 C. B., 795*.

It is apparent at first sight, that the first and second prayers of the plaintiffs are wholly inconsistent with the fifth prayer of the defendants. The first by implication, the second in express words, deny the right of the defendants to deduct from the plaintiff's claim the "L. A."

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(long arch) brick which they did not use, *although* Mr. Crangle *may* have agreed with them that they should not pay for such brick, and *may* have been authorized to do so by the plaintiffs. In permitting all three of these prayers to go to the jury, the Court granted inconsistent instructions, which is error. *Haney vs. Marshall*, 9 Md., 194, 216; *Cumb. Coal & Iron Co. vs. Tilghman*, 13 Md., 74, 85; *Adams vs. Capron*, 21 Md., 186, 206; *B. & O. R. R. Co. vs. Blocher*, 27 Md., 277, 286; *Cooper vs. Utterbach*, 37 Md., 282, 314.

But the error was even more serious, for the defendants' fifth prayer having been *conceded* became the *law of the case*, and a prayer inconsistent with its terms was plainly erroneous. *B. & O. R. R. Co. vs. Resley*, 14 Md., 424; *Sittig vs. Birckestack*, 35 Md., 273.

*Joseph P. Merryman*, for the appellees.

An exception, which is neither signed nor sealed by the Judge is no law. No exception and no question can arise from it. The exception must be sealed by the Court. *Milburn vs. State*, 1 Md., 13.

The bill of exceptions not having been signed and sealed by the Court, the motion of appellants to amend the same cannot be considered by this Court. *Milburn vs. State*, 1 Md., 13; *Rutherford vs. Pope, et al.*, 15 Md., 579; *Clemens vs. Mayor, &c.*, 16 Md., 208; *Ridgely vs. Bond*, 17 Md., 14.

And even if said motion had been granted, the bill of exceptions tendered by appellants would not have contained a true statement of the facts in the case.

GRASON, J., delivered the opinion of the Court.

The first exception was taken to the refusal of the Court below, to incorporate in a bill of exceptions tendered by the appellants, certain evidence which they allege was not admissible, and to the admission of which they assert they had objected.

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The refusal of the Court to sign and seal a bill of exceptions, or to incorporate therein certain evidence, cannot be reversed by this Court upon a bill of exceptions taken to such refusal, unless the refusal of the Court below is based upon its opinion that such evidence is irrelevant. A party feeling himself aggrieved by such refusal, must resort to a different proceeding to have the error, if it be one, corrected. *Marsh, et al. vs. Hand*, 35 Md., 124. But if the first bill of exceptions were properly before us, we should have no hesitation in affirming the rulings of the Judge of the Baltimore City Court, for the reasons assigned by him for not signing the bill of exceptions tendered by the appellants' counsel, or inserting therein the evidence which their counsel requested to be incorporated in it.

The second exception was taken to the granting of the appellees' five prayers and the refusal of the Court to grant the first, second, second B, and fourth prayers of the appellants, their third having been granted and their fifth and sixth conceded.

In the argument in this Court the counsel of the appellants admitted the correctness of the rulings of the Baltimore City Court, upon their first and fourth prayers, as also upon all the prayers of the appellees except the first and second, and abandoned their exception so far as they were concerned. But it was insisted that the Court erred in rejecting their second and second B prayers, and in granting the first and second of the appellees.

The second prayer B, it was admitted, was offered as an amendment of their second prayer. These prayers asked an instruction that, if the jury should find the facts therein stated, then the defendants were bound to pay for the bricks only such sum as the jury should find them to be worth to the defendants, unless the jury should further find that they agreed to take bricks of the color and quality actually sent by the plaintiffs, in place of those originally agreed upon, and unless the jury should further find that

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the defendants accepted said goods from the plaintiffs *under the further instructions of the Court*. To what instructions the jury were thus referred, whether to those granted at the instance of the appellees or to those of the appellants, which were granted and conceded, it was impossible for them to know. These prayers were calculated by this uncertainty to confuse and mislead the jury, and were for this reason properly rejected.

It is contended that the appellees' first and second prayers are in direct conflict with the appellants' fifth prayer, which being conceded, was the law governing the case. *Haney vs. Marshall*, 9 Md., 215; *Balto. & Ohio R. R. Co. vs. Blocher*, 27 Md., 286; *Cooper vs. Utterbach*, 37 Md., 314.

If there be such conflict, therefore, the judgment appealed from cannot stand.

The record shows that the plaintiffs offered proof at the trial that they had sold and delivered to the defendants all the bricks charged for in their bill of particulars, at the prices therein charged, and then the defendants offered evidence tending to prove that certain of the long arch brick charged for in said bill were of bad quality, so that they could not be cut, and were in great part spoilt in the fitting, and that Crangle, the plaintiffs' foreman, agreed on behalf of the plaintiffs, that only such of the same as were used should be paid for, and that a much larger number were charged for than were used. The plaintiffs then offered rebutting evidence to prove that the defendants had contracted to select the bricks themselves, and did select them, and that the bricks so selected by them were delivered by the plaintiffs, and that the fronts of the houses had been injured by the bricklayers inserting bricks intended for one story of the houses in another. In this state of the proof, the plaintiffs' first prayer was granted, instructing the jury that if they should find from the evidence that the plaintiffs paid and furnished to the

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defendants, at their request, the money and bricks charged in the bill of particulars, and that said bricks were furnished at the prices agreed upon between the parties to the suit, then their verdict must be for the plaintiffs for such amounts, if any, as the jury should find to be due to plaintiffs on the bill, with interest in their discretion.

Their second prayer instructed the jury that they should find for them under their first prayer, and should find that the bricks charged to defendants were delivered on the premises, or at such points as defendants directed, then their verdict must be for the plaintiffs, even if they should find the bricks were not used by the defendants; provided the jury should further find that the bricks furnished were the same bricks purchased by them of the plaintiffs. The appellants' fifth prayer, which was conceded, instructs the jury that they may deduct from the amount charged for long arch brick, in the bill of particulars, the amount of such brick, if any, which they may find from the evidence not to have been actually used by the appellants, provided they shall find from the evidence that the plaintiffs' foreman, Mr. Crangle, agreed with the appellants that they should pay only for such long arch brick as they actually used, and that Crangle was authorized by the appellees to make such agreement. In other words, the appellees' first and second prayers stated as a general proposition, that, if the jury should find the sale and delivery of the bricks, charged in the bill of particulars, at the prices agreed upon by the parties, the appellees were entitled to recover, notwithstanding the bricks were not used, while the appellants' conceded fifth prayer instructed the jury that, if they should find a special agreement, from the evidence, that the appellants were not to be charged for such of the long arch brick as were not used, then the amount of such long arch brick as were not used, might be deducted by the jury from the amount charged in the bill of particulars. We think it clear that

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this instruction, which the appellees conceded to be correct, is not inconsistent or in conflict with the appellants' first and second prayers, but is nothing more than a modification of them. The three instructions taken together tell the jury, that if they believe the bricks charged were sold and delivered at prices agreed on by the parties, the appellees are entitled to recover, although the bricks were not used, but if they should further find that there was a special agreement between the parties, that only such long arch brick as were used were to be paid for by the appellants, then the jury may deduct from the bill such long arch brick as they may find were *not* used. We think the language used by this Court in the case of *First National Bank vs. Jagers*, 31 Md., 51, especially applicable to the prayers in this case, which are said to be inconsistent and in conflict with each other. It was there said, with respect to prayers which were alleged to be in conflict with each other, "If the jury had been told the one instruction was a modification of the other, no objection could have been taken; and such, we think, was in this case, the substantial effect of granting both. It is to be presumed the jury was possessed of ordinary intelligence, and they must therefore, have regarded the instruction asked," (in this case conceded,) "as a modification" of the appellees' first and second prayers.

Finding no error in the rulings of the Judge of Baltimore City Court, the judgment appealed from will be affirmed.

*Judgment affirmed.*

(Decided 1st March, 1877.)

WILLIAM A. MCSHERRY vs. WALTER B. BROOKS and  
RANDOLPH BARTON, Assignees in Bankruptcy of  
KIRKLAND, CHASE & COMPANY.

*Partnership—Promissory note—Burden of proof—Inadmissibility of parol evidence to contradict and change the legal import of a negotiable note in the hands of an endorsee—What defences may and may not be availed of in an action against the maker by the endorsee of an overdue note—Effect of an endorsement made upon a note by the maker for the expressed purpose of reviving it—Admissibility of such note so endorsed in evidence under a count upon an account stated—Practice under the Act of 1864, ch. 6.*

An action at law cannot be maintained by one partner against another involving the state of the partnership accounts.

But one partner may sue another at law on a promise to pay a balance which has been ascertained and agreed upon.

And *a fortiori* may an action at law be maintained on negotiable promissory notes given by one partner to another for the amount of the balance ascertained upon dissolution.

And it would not be competent for the defendant to defeat such action by showing that there had been no final settlement of partnership accounts.

An adjustment of their partnership affairs was made by agreement under seal between S. and McS. as partners, which by agreement, was made, subject to the future possibility of a change in the amount of the assets that might be realized from the debts due the firm. If any collections could be made on account of debts supposed at the time to be bad or doubtful, McS. was to be entitled to a proportionate abatement from the amount of certain promissory notes, which he gave to S. in settlement of his proportion of the indebtedness of the firm as ascertained by said adjustment. While on the other hand if, by the exercise of due diligence, less could be realized than was supposed to be good, McS. was to be charged with a proportionate



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amount of said loss. In an action against McS. by the endorsee after maturity of these notes, **Held**:

- 1st. That the *onus* was upon the defendant as to any collections of such bad or doubtful debts as would entitle him to a credit upon the notes.
- 2nd. That notwithstanding the notes were overdue from the time they were made, yet, being made negotiable in form, they were negotiable at the time they were transferred to the plaintiffs.
- 3rd. That the endorsees having taken the notes overdue, it would have been competent for the defendant to avail himself of any equities that attached to the notes themselves, or to show a want of consideration, or that they had been transferred to the plaintiffs in trust for the maker; but not to destroy their legal import and operation, by the introduction of parol evidence of an agreement that the notes were not to be negotiated; or that they were not to be sued on until it should be ascertained whether certain debts could be realized or not.

When the notes were nearly out of date, the defendant was called on by the holder of them, and notified that unless something was done suit would be brought upon them. Whereupon the defendant signed the following endorsement upon each of the notes: "Paid Dec. 16th, 1872, \$5.00 on acct. of this note to revive the same." **Held**:

That if the parol evidence of the agreement relied on by him as a defence, were otherwise admissible, the defendant had effectually precluded himself from the resort to such defence by said endorsement upon the notes.

**Held** further in said action:

- 1st. That it was not necessary to require the jury to find, as essential to the plaintiffs' right of recovery, that all the partnership debts of S. and McS. had been paid.
- 2nd. That where as in this case the defendant has appeared and pleaded, and the cause has been brought to trial in regular course, the affidavit filed with the declaration to entitle the plaintiff to a judgment by default, under the Act of 1864, ch. 6, as authorized by the Act, in no manner controls the nature and character of the proof that may be offered by the plaintiff in support of his action.
- 3rd. That if there were any question of the plaintiffs' right to recover on the notes as specially declared on, there could be none whatever of their right to recover on them with the defendant's endorsement thereon, under the count on an account stated.

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APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

*Exception.*—At the trial the plaintiffs offered the following prayer :

The plaintiffs asked the Court to instruct the jury, that if they find that the defendant executed the five promissory notes sued on, and delivered them to Shurtz, the payee, and that said notes were endorsed for value by said Shurtz to the commercial firm of Kirkland, Chase & Co., before its failure, and that the plaintiffs are the assignees in bankruptcy of said firm, appointed after its failure, and that said notes passed to said plaintiffs, as such assignees, and that the defendant made to the plaintiffs, then being holders of said notes, the payments mentioned in the agreements, dated 16th December, 1872, and that said agreements were signed by said defendant, and endorsed on said notes respectively, and that in consequence thereof, the defendant received the indulgence testified to by the witness Barton; and that said notes, when they were passed by the defendant to said Shurtz, as aforesaid, were so passed to secure to him the payment of the amount found to be due from the defendant to the firm of W. A. McSherry & Co., under the agreement dated January 1, 1870, entered into upon the dissolution of said firm, given in evidence, then the plaintiffs are entitled to recover in this suit the amount of said notes and interest; unless the jury shall find that said Shurtz has collected, or could have collected a larger sum from the bad and doubtful debts referred to in said agreement, than the amount which has proved to be bad of the debts which by said agreement were taken by him as good; and if the jury should find that said Shurtz collected or could have collected a larger sum from said bad and doubtful debts, than the amount which has proved to be bad, of the debts which he took as good, then the plaintiffs are entitled to recover the amount of said notes and interest, after crediting to the defendant thereon,

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one-third of the amount of such larger sum or excess so collected by said Shurtz, with interest on such excess ; and if the jury should find that no part of the debts which said Shurtz, by said agreement took as good, has proved to be bad, then the defendant is entitled to a credit for one-third of all the debts taken as bad or doubtful, which said Shurtz has collected or could have collected, with interest thereon.

And the defendant the twelve following prayers :

1. The defendant prays the Court to instruct the jury, that if they believe from the evidence, that Mr. Shurtz and Mr. McSherry were co-partners, and dissolved and accounted together, at or about the date of the cause of action in this case, and that said causes of action represented the balance then in favor of Mr. Shurtz, and that the said causes of action were past due at the time of their execution and delivery to Mr. Shurtz, if the jury shall find that said causes of action were delivered to Mr. Shurtz, and that the aforesaid accounting between Mr. Shurtz and Mr. McSherry, was not a final accounting, but that they were outstanding claims due to and by the said Shurtz and McSherry, and that the said Shurtz undertook and agreed that the said McSherry should be debited on account of future payments by the said Shurtz, and should be credited for payments to the said Shurtz of said claims so due by and to the said Shurtz and McSherry, or that it was intended that another account should be had between the said parties furnished by said Shurtz, then the said causes of action are memoranda of indebtedness then existing, to be changed by subsequent payments and disbursements, and not promissory notes ; that a final accounting by Mr. Shurtz to Mr. McSherry, was a condition precedent to the bringing of a suit by Shurtz against McSherry, and that there is no evidence of an account between the said Shurtz and the said McSherry, and their verdict must be for the defendant.

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2. If the jury shall find from the evidence, that Mr. Shurtz promised and agreed with McSherry, that Mr. Shurtz would keep the said promissory notes in his possession, and not pass them away, and Mr. McSherry delivered said notes to Mr. Shurtz, upon this agreement and understanding, and if they shall further find that said Mr. Shurtz passed the notes away, and that said notes were past due at the time of their being so passed away, then their verdict must be for the defendant in this action.

3. That the plaintiffs cannot recover upon the first five counts under the pleadings and evidence in this case, because they have shown to the jury that their causes of action do not represent the true state of accounts between Mr. Shurtz and Mr. McSherry, and they cannot recover on the sixth count, because they have not shown any accounts stated between the plaintiffs or Mr. Shurtz with the defendant.

4. That even if the jury should find that there is and was an outstanding indebtedness between McSherry and Shurtz, yet they cannot find for the plaintiffs, because there is no sufficient assignment by Shurtz, of any such outstanding indebtedness to the plaintiffs in this case, and Mr. Shurtz is not now in a condition to make such assignment, and the verdict must be for the defendant.

5. That in making up their verdict, the jury must exclude all evidence pertaining to the state of accounts between Shurtz and McSherry at the time of the dissolution of the co-partnership or afterwards, whether they find the amount due by McSherry to Shurtz greater or less than the face of the notes, if the jury believe that the notes were given by McSherry to Shurtz, as memoranda of indebtedness, upon condition that the said notes were to remain in Shurtz's safe and possession, and he would not pass them away, and that a final account should be stated between them at some future time; and if they find that such an understanding or agreement existed, to wit: That Shurtz

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would keep the said notes in his possession and not pass them away, and would render a final account to McSherry, then such an agreement is a condition precedent to the bringing of a suit by Shurtz against McSherry, and if they find that the said notes passed to the plaintiffs insolvents, after maturity, then the plaintiffs are affected with notice of said agreement and understanding, and occupy before this jury the position of Mr. Shurtz, and are not entitled to recover unless they have satisfied the jury that said precedent condition has been performed by said Shurtz.

6. That before the plaintiffs can recover, if the jury believe that Mr. Shurtz undertook to pay the partnership debts of Wm. A. McSherry & Co., the plaintiffs must produce a release in full to said Wm. A. McSherry & Co., of the creditors of that firm, releasing Wm. A. McSherry from his liability as a member of said firm, and that the mere assertion of Mr. Shurtz in this case, that he paid the debts of the partnership of W. A. McSherry & Co., is not sufficient evidence in the law, of a payment by him of said debts, though they should find that McSherry had not been hitherto called upon to pay said debts.

7. That if the jury believe from the evidence that the defendant paid to the plaintiffs the sum of \$5 on each of said notes, the causes of action in this case, "to revive" the same, as is set forth on the back of said notes offered in evidence by plaintiffs, and that said defendant promised to pay said notes, and that at the time of said payment and promise, said notes were past due and in the possession of the plaintiffs; that such payment and promise do not preclude the defendant from setting up such defences as he had before said payment and promise, except the Statute of Limitations, which said defendant has not pleaded in this case, nor do such payment and promise alter the character and nature of said notes as originally impressed upon them at the time of their execution, nor preclude the

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defendant from showing all the transactions and circumstances attendant upon the execution of said notes, which attendant transactions and circumstances are in the law called the *res gesta*.

8. That if the jury believe from the evidence that Mr. McSherry executed the notes, the causes of action in this case, and passed them to Mr. Shurtz, past due on their face, and that the said notes were for an antecedent indebtedness, and that said notes were executed and delivered with the understanding and agreement on the part of Mr. Shurtz that he would not pass them away but keep them himself, then the execution and delivery of said notes by McSherry for such antecedent debt, was a good and valid consideration for said promise and agreement on the part of Mr. Shurtz, said agreement and undertaking were a part of said notes, the attempt by Mr. Shurtz to pass said notes after maturity to the plaintiffs insolvents was a breach of his said undertaking and agreement, said plaintiffs insolvents and said plaintiffs were affected with notice of said undertaking on the part of said Shurtz, and the said plaintiffs have no standing in this Court on the said notes, and the verdict of the jury on the first five counts in the plaintiffs' *narr.* must be for the defendant.

9. If the jury shall find from the evidence that the defendant executed the notes offered in evidence and delivered them to Mr. Shurtz, when they were overdue on their face, and that Mr. Shurtz was then a partner of the defendant, and that at the time of the execution and delivery of the said notes, it was agreed between the said defendant and Mr. Shurtz that the said notes did not represent the indebtedness between them, but that said indebtedness was to be determined by an account of the partnership transactions of defendant and Mr. Shurtz, which the latter agreed to render; and if the jury shall further find that Mr. Shurtz has never rendered any account to the defen-

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dant of the partnership transactions as agreed, then the plaintiffs are not entitled to recover.

10. If the jury shall believe from the evidence that Shurtz and McSherry were co-partners, and about January 1, 1870, took stock and made other arrangements with a view to the dissolution of their co-partnership, and found, according to the then existing condition of their partnership affairs, that the indebtedness of McSherry to Shurtz was a certain sum; and if the jury shall further find that McSherry for that sum executed to Shurtz the promissory notes offered in evidences by plaintiffs, and that the said notes were then on their face overdue, and that said notes were understood by both partners not to represent the state of accounts between them, but that certain partnership matters to come up thereafter would modify and change said sum, and that thereupon another accounting was to be had between said co-partners, and that such other accounting was never in fact had between said partners; and if the jury shall further find that said partnership matters, or some of them, did come up to modify and change said sum, and that the exact state of accounts between said co-partners had not been ascertained by said co-partners before the bringing of this suit, then the plaintiffs cannot recover.

11. That the plaintiffs cannot recover upon their sixth count in their declaration, because they brought their suit under the Act of 1864, with an affidavit setting forth the causes of action upon which they grounded their said suit, to wit: the promissory notes offered in evidence by said plaintiffs, and that the said plaintiffs cannot at the trial base their said suit upon a different cause of action from the one sworn to by them, to wit: upon an account stated; and the jury must exclude from their deliberations all evidence tending to show an account stated between said plaintiffs and said defendant, or tending to prove any other cause of action except said promissory notes, the causes of action referred to in said affidavit.

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12. The defendant prays the Court to instruct the jury that upon the pleadings and evidence in this case, the plaintiffs cannot recover.

The Court (BROWN, J.,) granted the plaintiffs' prayer, and refused the defendant's prayers. The defendant excepted.

The jury rendered a verdict for the plaintiffs, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY and ROBINSON, J.

*J. B. Wentz*, for the appellant.

*F. W. Brune*, for the appellees.

By the true meaning of the agreement of dissolution, the notes taken under it, were to stand and to be enforced, as the least debt due by the appellee to Shurtz and his assigns, under said agreement, unless said Shurtz should collect a larger sum from the appellees' proportion of the outstanding *bad* or *doubtful* debts than he could charge to the appellant for his proportion of the debts called *good*, which Shurtz should fail to collect, and as the jury found that there should be no credit on said notes, in favor of the appellant, on account of such collections, the jury rightfully, under the instruction of the Court, contained in appellees' prayer, found a verdict for the appellees for the amount of said notes and interest, and the Court properly rejected the appellant's first, fifth, ninth and tenth prayers, which permitted the jury to find, that under said agreement, said promissory notes were mere memoranda of indebtedness then existing, to be changed by subsequent payments and disbursements, and that a final accounting between Shurtz and McSherry, was a condition precedent to the bringing of suit by Shurtz against McSherry, and that there was no evidence of such an accounting between



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them. 2 *Pars. on B. & N.*, 501-2; *Rawson vs. Walker*, 1 *Stark*, 361, (2d *E. C. L.*, 427; ) *Moseley vs. Hanford*, 10 *B. & C.*, 729, (21st *E. C. L.*, 156; ) *Foster vs. Jolly*, 1 *Comp., M. & R.*, 703, 707.

In opposition to said written agreement, and the negotiable notes given in accordance with it, the appellant cannot set up as one of the terms or conditions of said agreement not appearing in the written paper, that Shurtz was to keep them in his safe or possession, and not negotiate or pass them away, and, therefore, the Court properly rejected the appellant's second, fifth, seventh and eighth prayers. See cases under previous point, and *Bladen vs. Wells*, 30 *Md.*, 581; *Long vs. Crawford*, 18 *Md.*, 221; *Renwick vs. Williams*, 2 *Md.*, 364.

Even if appellant could set up the alleged agreement to keep and not negotiate or pass away said notes, in a controversy between Shurtz and him on said notes, which the appellees deny, yet the appellant cannot set up such a defence against them who are *bona fide* holders for value, without notice of such agreement, and that the agreement between them as such holders, and the appellant, of the 16th of December, 1872, revive said notes, made upon the consideration of indulgence, estops the appellant from setting up any such defence, and therefore, appellees contend that the Court properly rejected appellant's seventh prayer. *Funk vs. Newcomer*, 10 *Md.*, 317; *Starr vs. Yourtee*, 17 *Md.*, 351; *Brown vs. Rowles*, 21 *Md.*, 28; *Stallings vs. Kirby*, 27 *Md.*, 156; *Abrahams vs. Sheehan*, 40 *Md.*, 459; *Md. Fire Ins. Co. vs. Gusdorf*, 43 *Md.*, 513-4; *Fall River Bank vs. Buffinton*, 97 *Mass.*, 499, 500; *Tobey vs. Chipman*, 13 *Allen*, 124, 125.

The Court properly rejected appellant's third prayer for the reason already given against his other prayers, and also because the promissory notes given in evidence were themselves evidence of an account stated in addition to the other evidence in the record, showing that their agreement

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to dissolve was necessarily and in fact connected with a careful statement and settlement of the accounts between them. *Lee vs. Tinges*, 7 Md., 227; *Sanders' Plead. & Ev.*, 31.

The fact that Shurtz and McSherry had been partners, and that Shurtz, after dissolution, was charged with collecting the outstanding, bad and doubtful debts, according to the agreement, did not prevent or affect the liability at law of McSherry upon the notes, especially when in the hands of a third party who is *bona fide* holder for value, which is a question raised under the appellant's tenth prayer. *Wadsworth vs. Manning*, 4 Md., 59; *Parsons on Partnership*, 278, 279.

ALVEY, J., delivered the opinion of the Court.

This action was brought by the assignees in bankruptcy of Kirkland, Chase & Co., indorsees of five promissory notes, against the defendant, the maker. The notes all bear date the 1st of January, 1870, though the proof is that they were made on the 10th of January, 1870. Each of the notes is for the sum of \$5,652.89, making in the aggregate the sum of \$28,264.46. All these notes were drawn in the ordinary form, and made payable to the order of W. D. Shurtz, one day after date.

The declaration contains six counts; five upon the several promissory notes, and the sixth upon an account stated. To this declaration the defendant pleaded, and issues were joined.

The facts of the case are few and do not appear to be disputed.

The defendant and W. D. Shurtz, prior to the 10th of January, 1870, had been engaged as partners in the grocery business, under the name of W. A. McSherry & Co.; and on the 10th of January, 1870, the partnership was dissolved, under an agreement between the partners as to the mode of settlement. At that date an account

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was stated, and a large deficit was found to exist; and Shurtz undertook the settlement of all partnership liabilities, and the defendant, in consideration of such undertaking, agreed to give Shurtz his note for \$28,264.46, dated the 1st of January, 1870, payable one day after date. This was the amount ascertained at the time that the defendant would have to contribute to make up the deficiency in the assets of the firm, upon the assumption that of all the debts due the firm many of them were either bad or doubtful. The record contains the account of the condition of the partnership at this date, in the handwriting of the defendant himself; and in the schedule of debts those supposed to be bad or doubtful were distinguished from the good. The agreement entered into at the time of dissolution is as follows: "In view of W. D. Shurtz settling the accounts of W. A. McSherry & Co., W. A. McSherry has given his note, dated January 1st, 1870, one day after date, for \$28,264.46, with interest, with the understanding that if any accounts or parts of accounts now taken as bad and doubtful, should hereafter be collected, he, the said W. A. McSherry, is to be credited on the said note with his proportion of the amount, which is one-third. Also, if any debts due to W. A. McSherry & Co., that are now taken as good, should prove to be bad, he, the said W. A. McSherry, is to be charged with his proportion, which is one-third the amount, on said note."

This agreement is under the hands and seals of the parties, and was produced from the possession of the defendant. It was proved, indeed conceded, that instead of one note as contemplated by the agreement, the five notes sued on were substituted. These notes were held by Shurtz for several months, and he then indorsed them to Kirkland, Chase & Co., without recourse, in part payment of a prior indebtedness of \$183,000. After the notes came into the hands of the assignees of the latter firm, the defendant

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was approached upon the subject of the notes, and notified that, unless something was done, suit would be brought thereon, and thereupon the defendant signed the following indorsement upon each of the notes: "Paid, Dec. 16, 1872, \$5 on acc. of this note, to revive the same." Suit was not brought on the notes until May 5th, 1875.

At the trial in the Court below the plaintiffs offered one prayer, and the defendant twelve. The one prayer of the plaintiffs was granted, and all those on the part of the defendant were rejected. The defendant excepted as well to the granting of the plaintiffs' prayer as to the refusal to grant those offered by himself.

By the prayers thus ruled upon by the Court below, several questions were raised for decision; and without stating the propositions involved in each prayer separately, we shall state such principles as we think control the case, and then dispose of the prayers as they may or may not accord with those principles.

1. The first proposition contended for on the part of the defendant is, that inasmuch as the notes were over-due at the time of their transfer to Kirkland, Chase & Co., and were therefore subject to the equities as between the original parties, no action at law can be maintained on them, until a further account has been taken between the partners, under the agreement made at the time of dissolution, and under which the notes were given. That the account stated at the time of the dissolution, and which is set forth in the record, was not a final account, and that the notes sued on, though in the form of ordinary negotiable promissory notes, were made only provisionally and intended to abide the final settlement of the partnership affairs; and consequently, until there has been a final account and the affairs of the partnership all adjusted, no action at law can be maintained on the notes, either by the payee himself, or his indorser, taking the notes over-due.

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The general rule is too well established to admit of any question, that actions at law cannot be maintained by one partner against another, involving the state of the partnership accounts. This general rule is founded upon certain well defined reasons; to be found stated in the authorities. But it is equally well established, that one partner may sue another at law on a promise to pay a balance which has been ascertained and agreed upon. In reference to such balance the reasons for the inability of the partner to maintain an action at law against a co-partner no longer exist. If, says Mr. Parsons, the settlement has closed their concerns, or has followed the dissolution of the partnership, they are no longer partners at all, and if the partnership goes on, they are not partners as to this balance, because it has been taken out of the current accounts, separated from the partnership, and appropriated to the partner to whom it is due. *Pars. on Part.*, (2nd Ed.,) 290; *Brierly vs. Cripps*, 7 C. & P., 709; *Wray vs. Milestone*, 5 M. & W., 21. And if an action at law may be maintained for such balance, *a fortiori* may an action at law be maintained on negotiable promissory notes given by one partner to another for the amount of the balance ascertained upon the dissolution. And it would seem, both upon reason and authority, that it would not be competent for the defendant to defeat such action by showing that there had been no final settlement of partnership accounts. *Pars. on Part.*, (2nd Ed.,) 285; *Preston vs. Struttun*, 1 Anst., 50; *Rockwell vs. Wilder*, 4 Metc., 562. In the last case cited, the facts were quite analogous to those of the present case, and it was there held that the note was for a good and sufficient consideration, and that payment thereof could be enforced by an action at law, although there had been no balance actually struck between the partners.

In this case, there was in fact an adjustment of the partnership affairs as between partners; but it was made

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by agreement subject to the future possibility of a change in the amount of the assets that might be realized from the debts due the firm. If any collections could be made on account of debts supposed at the time to be bad or doubtful, then the defendant was to be entitled to a proportionate abatement from the amount of the notes; while, on the other hand, if, by the exercise of due diligence, less could be realized than was supposed to be good, the defendant was to be charged with a proportionate amount of such loss. The debts due the firm were all scheduled; and it required no re-statement of partnership accounts in order to ascertain what particular debtors had paid, or those who had not. If there had been payments on account of bad or doubtful debts, that was a matter of fact of easy ascertainment, and the jury were quite competent to pass upon the question as to the credits to which the notes were subject in respect to such payments, if any had been made. The *onus* of proof, as to such payments, was upon the defendant; *National Bank of Washington vs. Texas*, 20 Wall., 72; and upon the proof that was offered in respect to collections made on account of the bad and doubtful debts, the jury were instructed in a manner as favorable to the defendant as he could possibly ask. By the instruction granted at the instance of the plaintiffs, the defendant was given the full benefit of all rights secured to him by the agreement of dissolution, and under which the notes were given to Shurtz. And from what we have said, it follows that the position assumed by the defendant, as to the necessity for taking further partnership accounts, as a condition upon which an action can be maintained upon the notes, cannot be sustained.

2. The next question raised by the prayers offered on the part of the defendant is, whether it was competent to the defendant to show by parol that, at the time of the making and delivery of the notes, it was agreed and understood between the parties that the payee would retain

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the notes in his own possession, and not negotiate or transfer them to any third person, and thus defeat the right to recover by the present plaintiff?

The law is perfectly well settled that a promissory note, negotiable in form, is negotiable as well after as before it becomes due; *Annan vs. Houck*, 4 Gill, 325; *Renwick vs. Williams*, 2 Md., 356; *National Bank of Washington vs. Texas*, 20 Wall., 72; and in this case, notwithstanding the notes were overdue from the time they were made, yet they were made in a negotiable form, and therefore negotiable at the time they were transferred to Kirkland, Chase & Co. It must be supposed that there was some purpose or design in making the notes in the form that they bear; and to allow the maker by parol to contradict and change the legal import of the notes, would seem to be contrary to all principle and authority. Kirkland, Chase & Co. having taken the notes overdue, it would have been competent to the defendant to avail himself of any equities that attached to the notes themselves, or to show a want of consideration, or that they had been transferred to the plaintiffs in trust for the maker; but certainly not to destroy their legal import and operation by the introduction of parol evidence that the notes were not to be negotiated, notwithstanding the negotiable terms employed on their face, or that they were not to be sued on until it should be ascertained whether certain debts could be realized or not, notwithstanding they were made payable one day after date. This would be to contradict and limit the written contract by mere parol; and the question is, can this be done? "What is to become of bills of exchange and promissory notes," asked Lord ELLENBOROUGH, in *Hare vs. Graham*, 3 Campb., 57, "if they may be cut down by a secret agreement, that they shall not be put in suit." "If I issue a promissory note payable at two months," says PARK, J., in *Free vs. Hawkins*, 8 Taunt., 92, "and enter into a parol agreement, that the

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note shall not be put in suit, till the end of five years, or until the uncertain period of the sale of an estate, can it be contended that such a parol agreement does not contradict and limit the written contract, into which I have entered." And he and the other Judges all declared that the note in that case could not be so contradicted and restrained in its legal operation. There the plaintiffs, *London* bankers, were correspondents of Sir *Robert Salisbury & Co.*, who were country bankers, considerably indebted to the plaintiffs, and ten persons agreed to put their names on the back of a promissory note for a certain amount, payable at one year, to be made by Sir *R. Salisbury* in their favor, and to be indorsed by each of them to the plaintiffs, as a security for the debt of the country bank. This was accordingly done; and DALLAS, J., in delivering the leading opinion in the case, said: "It is then said, that at the time when this note was made and indorsed, it was mutually understood, that payment should not be enforced until Sir *Robert Salisbury's* effects were brought to sale, and that the plaintiffs entered into this contract with the defendant, *with a full knowledge of all these circumstances*. One thing is to be observed; if such were meant to be the understanding, it ought to have been expressed on the instrument; but it is not expressed; and, taking the instrument as it stands, it is a common promissory note, and requires that notice of dishonor should be given to the defendant in order to give the plaintiffs a right to recover against him. But, it is said, notice was dispensed with by the understanding which existed between the parties; to which the answer is, that if parties mean to vary the legal operation of an instrument, they ought to express such variance; if they do not express it the legal operation of the instrument remains. The effect of the evidence tendered would be to vary the note in question, and to control its legal operation; and such evidence, I think, is inadmissible." And to the



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same effect are the cases of *Moseley vs. Hanford*, 10 B. & Cr., 729; *Foster vs. Jolly*, 1 Cr. M. & R., 703; *Bank of U. S. vs. Dunn*, 6 Pet., 51. It is clear, therefore, that the terms of the notes could not be contradicted and controlled by the parol agreement or understanding as proposed by the defendant.

But if the principle were otherwise, and the defendant could, in the absence of any *ex post facto* occurrence to prevent, be allowed to defeat the legal operation of the notes by the proof of such a parol agreement as that offered in this case, he has effectually precluded himself from the resort to such defence, by the indorsements upon the notes of the 16th of December, 1872. These indorsements were intended to keep in operation the notes, then in the hands of the plaintiffs; and if the defendant had intended to rely upon any such defence as that afterwards set up by him, good faith required that he should have made it known, instead of the indorsements placed upon the notes by him. He obtained indulgence by the acknowledgment, and it is but a fair construction of the indorsements, that they were intended as renewals of the promises expressed on the face of the notes, in consideration of the indulgence extended. After obtaining the benefit of the indulgence, good faith utterly forbids that he should attempt to defeat the plaintiffs' recovery on the notes, by showing that they were not properly in the hands of the plaintiffs, and were not liable to be put in suit. Such a defence is wholly inconsistent with the indorsements on the notes, and hence could not be allowed.

As the result of the foregoing considerations, it follows that the first, second, third, fourth, fifth, seventh, eighth, ninth, tenth and twelfth prayers of the defendant were properly rejected by the Court below; those prayers all being founded on theories at variance with the views and principles, herein expressed.

3 There is another question to be determined, raised on the instruction granted at the instance of the plaintiffs,

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and that is, whether it should have been submitted to the jury to find, as matters of fact, that Shurtz had fully paid all the partnership debts, as a condition upon which the plaintiffs could recover on the notes? It does not appear that there are creditors still unpaid, and Shurtz himself proved that he had paid all the debts; but the defendant not only insists that the jury should have been required to find the fact of such payment, but, according to his sixth prayer, insists that it was necessary for the plaintiffs to produce releases in full from the creditors to the firm, as the proper evidence of such payment.

Apart from all questions as to the mode of proof, we think there was no condition precedent to the right of recovery on the notes, in respect to the payment of the partnership debts. The notes, as we have seen, are negotiable, and were made payable one day after date. The obligation assumed by Shurtz to pay all the partnership debts necessarily contemplated some reasonable time within which it could be done; as we may suppose his ability to pay the debts depended to some extent upon his collection of the assets due the firm. In such state of case, the rule of law is clear and decisive; and nowhere is it better or more succinctly stated than in 2 *Parsons on Contracts*, 189, 190, where it is said, "If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of this thing is a condition precedent to the payment; and if the money is to be paid in instalments, some before a thing is to be done, and some when it is done, the doing of the thing is not a condition precedent to the former payments, but it is to the latter. And if there is a day for the payment of the money, and this comes before the day fixed for the doing of the thing, or before the time when the thing, from its nature, can be performed, then the payment is at all events obligatory, and an action may be brought for it independently of the act to be done." And the same principles are fully and clearly stated by Mr. Sergeant Williams, in a

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note to the case of *Pordage vs. Cole*, 1 *Wms. Saund.*, 319, where the cases are extensively collected and reviewed, and the conclusions there deduced are fully sanctioned by this Court in the case of *Watchman & Bratt vs. Crook*, 5 *G. & J.*, 259, 260; see also case of *Goldsborough vs. Orr*, 8 *Wheat.*, 217.

It therefore cannot be objected to the instruction given by the Court, that the jury were not required to find that the partnership debts had been paid; and it follows that there was no error committed in refusing to grant the sixth prayer of the defendant, which required the Court to say that it was incumbent upon the plaintiffs to produce releases of all partnership debts assumed to be paid by Shurtz, as a condition upon which recovery could be had upon the notes.

4. The remaining question is that made by the eleventh prayer of the defendant; but as the judgment in this case was not entered by default, under the Act of 1864, ch. 6, the question is quite immaterial. Where the defendant has appeared and pleaded, and the cause has been brought to trial in regular course, the affidavit filed with the declaration, to entitle the plaintiff to a judgment by default, as authorized by the Act, in no manner controls the nature and character of the proof that may be offered by the plaintiff in support of his action. But in this case, if there was really any question of the plaintiffs' right to recover on the promissory notes as declared on in the first five counts of the declaration, there could be none whatever of their right to recover on the notes, with the defendant's indorsements thereon, under the count on an account stated. *Leeper vs. Tatton*, 16 *East*, 423; *Peacock vs. Harris*, 10 *East*, 104; *Oliver vs. Dovatt*, 2 *Mood & Rob.*, 230; *Fesenmayer vs. Adcock*, 16 *M. & W.*, 449.

Finding no error in the rulings of the Court below, we affirm the judgment.

*Judgment affirmed.*

(Decided 1st March, 1877.)

HENRY M. WARFIELD *vs.* FERDINAND C. LATROBE.*Appeal—Contested Mayoralty Election—Jurisdiction of the Superior Court of Baltimore City.*

The Constitution of 1867, continued in force all Acts of Assembly, not inconsistent with the provisions of that instrument. At the time of the adoption of the Constitution, the following sections of Art. 35 of the Code, were in force. "Sec. 53.—All cases of contested election of any of the officers not provided for in the Constitution, or in the preceding section, shall be decided by the Judges of the several Circuit Courts, each in his respective Circuit, and by the Superior Court of Baltimore City, in Baltimore City. Sec. 54.—Each Judge of the Circuit Court, and of the Superior Court of Baltimore City, may adopt such mode of proceeding in cases of contested elections, and prescribe such rules for taking testimony, and adjudging costs as to him shall seem most satisfactory and least expensive." On a case of contested mayoralty election in the Superior Court of Baltimore under the foregoing sections of the Code, HELD:

That the jurisdiction of the Superior Court of Baltimore City, in cases of this kind, is a special and exclusive jurisdiction, and there being no provision by the law for the right of appeal, its judgment in the premises is final and conclusive.

APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER, ALVEY and ROBINSON, J.

*C. Irving Ditty* and *Robert D. Morrison*, for the appellant.

The Superior Court of Baltimore City, is a Court of general jurisdiction, is one of the highest common law

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Courts of record and original jurisdiction within this State, has full common law powers and jurisdiction in all civil cases, within the City of Baltimore, (except where by law the jurisdiction has been taken away, or conferred upon another tribunal,) and all the additional powers and jurisdiction given by the Constitution and by the law.

It has general jurisdiction over the subject-matter of contested elections, and the fact that these proceedings are in their present form, rather than in the stricter form of pleading, *quo warranto* for instance, does not affect the general jurisdiction of the Court, or make this a case of special or limited jurisdiction. These proceedings are not in derogation of the common law, deprive the appellee of no right which he would have had under *quo warranto* or other common law proceedings, "are within and in accord with the general jurisdiction of the Court, and are in accordance with our simplified system of pleading." The general jurisdiction of the Court in this case is presumed. *Code Pub. Gen. Laws, Art. 29, secs. 44-50; Evans' Practice, pp. 28-30, and notes; Manly vs. State, 7 Md., 137; Code Pub. Gen. Laws, Art. 75, sections 2, 3, 4 and 5; Spencer vs. Trafford, 42 Md., 21; Sedgwick on Statutory and Constitutional Law, 271-274, and notes; Boorman vs. Israel & Patterson, Ex'rs, 1 Gill, 381; Williams vs. Williams, 7 Gill, 305; Cockey vs. Cole, 28 Md., 282; Kelsey, et al. vs. Wiley, Parish & Co., 10 Georgia, 382; Baubien vs. Brinckerhoff, 3 Illinois, 270; Kenney vs. Greer, 13 Illinois, 433; Wright vs. Douglass, 10 Barbour, 110; High on Extraordinary Legal Remedies, 622.*

The case of a contested election for the office of State's attorney has been carved out of the general subject-matter, and jurisdiction in such cases has been conferred upon the Courts of criminal jurisdiction. This furnishes a case of special limited jurisdiction,—general jurisdiction of the subject-matter being lodged by law, as to Baltimore City, in the Superior Court. *Constitution, Art. 5, sec. 8.*

The Superior Court of Baltimore City being a Court of general jurisdiction, and this being a case within its general jurisdiction, the appeal cannot be denied.

The right of appeal from any decision of a Court of general jurisdiction, "is conceded to the citizen by the common law in all civil cases, without check or control of any kind whatever," and the only control exercised by statute is to provide by bond against abuse of that right. "Very grave reasons should be required to induce the Court to refuse the right of appeal, and any interference with that right, is a delicate subject to be applied with jealousy." Every intendment should be in favor of the right. *Ringgold's case*, 1 *Bland's Chan. Reports*, 7-15, &c.; *Williams vs. Williams*, 7 *Gill*, 302; *Swann vs. Mayor and City Council of Cumberland*, 8 *Gill*, 154.

The preceding authorities and the Constitution and Code of Maryland in defining the jurisdiction of the Superior Court, all use the words civil cases in contradistinction to "criminal cases." This is certainly not a criminal case, and it must therefore be a civil case.

A civil case is one which has for its object the recovery of private or civil rights, or compensation for their infringement. This is a case for the recovery of private and civil rights, and the fact that the public are peculiarly interested also, no more destroys the private and civil right of the appellant, than the interest of the public in punishing assaults by criminal proceedings, destroys the right of the injured party to his remedy by civil proceedings. *Quo warranto* has always been held to be the proper proceeding where the common law prevailed to try title to public office, except where otherwise specially provided by statute, which could not have been *quo warranto*, being a civil remedy, if contested elections were not civil cases. 1 *Bouvier's Law Dictionary*, 78-276-405, 12th Edition; 3 *Bouvier's Institutes*, 2638, and note, last Edition; 2 *Sharswood's Blackstone's Commentaries*, 1-119-263; *McCrary*

on Elections, 264-265-290-307-317-340, and note; *High on Extraordinary Legal Remedies*, secs. 603-617-621.

The authorities cited by the appellee, to sustain the proposition that this is neither a civil nor a criminal case, are not applicable, because those cases and all the previous ones therein cited, turn upon a peculiar condition of legislation never existing in this State, or upon the fact that the proceedings passed upon were not those of a Court of law. It is believed, that in none of the original thirteen States, nor in proceedings in accordance with the common law, has it ever been declared that an election contest is not a civil case.

See *Gibson vs. Shepperd*, 2 *Brewster*, 1, in which it was held that the officer before whom the affidavits were made had authority, because authorized to take affidavits in civil cases.

But even if this is a case of special and limited jurisdiction, under Code Public General Laws, Art. 35, secs. 53, 54, inasmuch as those sections do not provide the *particular mode of appeal*, the right of appeal in the case is secured "by the broad unqualified language of section 3, Art. 5, Code Public General Laws." *Swann vs. Mayor & City Council of Cumberland*, 8 *Gill*, 154; *Worthington, Adm'r vs. Herron*, 39 *Md.*, 148; *Abbott, Ex'r vs. Golibart*, 39 *Md.*, 554.

The cases wherein the right of appeal has been denied in this State, are those only where the appellate jurisdiction has already been given to another tribunal. The principle is that there shall not be double appeals. *Wilmington & Susquehanna R. R. vs. Condon*, 8 *Gill & Johnson*, 443; *Webster, et al. vs. Cockey, et al.*, 9 *Gill*, 93; *Lammott vs. Maulsby*, 8 *Md.*, 8; *Baltimore & Havre de Grace Turnpike Co. vs. N. C. R. R. Co.*, 15 *Md.*, 194; *Hough vs. Kelsey & Gray*, 19 *Md.*, 454; *Rundle vs. Mayor & City Council of Baltimore*, 28 *Md.*, 357; *Worthington, Adm'r vs. Herron*, 39 *Md.*, 148.

*Jas. A. Buchanan* and *Orville Horwitz*, for the appellee.

If by the provisions of the 53rd and 54th sections of Art. 35 of the Code, the Superior Court, as constituted by the present Constitution, has jurisdiction to try contested election cases at all, then it is a superadded, special and limited jurisdiction, not contained within the general jurisdiction of said Court; and the rule on that subject is, that unless by law the appeal to this Court is provided for, no such appeal exists. *Page vs. Mayor and City Council of Baltimore*, 34 Md., 558, 563. The cases referred to in the appellant's brief abundantly establish this proposition.

In *W. & S. R. R. vs. Condor*, 8 G. & J., 448, Judge DORSEY says:

"There is no appeal expressly given to the Court of Appeals, under the Act of Assembly, investing the County Court with the power of reviewing, and confirming or setting aside inquisitions" of land. "It is a special limited jurisdiction given to the County Court, from the decision of which no appeal lies to any other tribunal."

In *Sav. Man. Co. vs. Owings*, 3 Gill, 498, the whole doctrine on the subject is condensed by Judge CHAMBERS, (who delivered the opinion of the Court) in a few words:

"Jurisdiction of this proceeding—the opening of a road—is not exercised by the County Court in virtue of its general powers as a Court of common law."

This language may certainly be applied to a contested election case, or there would have been no need for the passage of the Act of Assembly. "It is vested by a special delegation of power and by the terms of the Act which confers it, to be exercised, not according to the form and course of the common law, but in a special and peculiar mode." "It is a general and sound rule that a writ of error will not lie to a Court vested with special jurisdiction, and which does not proceed according to the forms of the common law."



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In reference to contested election cases, the Court, although vested with general common law powers and jurisdiction, is expressly directed to adopt "such mode of proceeding" as to the Judge may seem best. See also *Williams vs. Williams*, 5 Gill, 84.

The case of *B. & Havre de Grace T. Co. vs. Nor. Cen. R. R. Co.*, 15 Md., 197, would seem to dispose of the idea entertained by the appellant "that the right of appeal is only denied where the appellate jurisdiction has been given to another tribunal," for this Court says, in delivering its opinion in that case, that "it is a well settled doctrine of this Court, that where the Circuit Court is clothed with a special jurisdiction and no appeal to this Court is provided for, the judgment is final, whether pronounced in the exercise of original jurisdiction, or in the nature of an appeal from some inferior authority."

By the terms of the 3rd section of 5th Article of the Code, an appeal is provided only from a determination of a Court of law *in a civil suit or action*, and a contested election case is not a civil suit or action.

The 4th section of the same article would seem to illustrate this. *A petition for freedom* was not, in the eyes of the law, a civil suit or action; and therefore the right of appeal did not exist by virtue of the 3rd section. In order to secure that right the additional section (4th) was passed.

[The points relating to the merits of the case are omitted on both sides, the same not having been considered by the Court.—REPORTER.]

ROBINSON, J., delivered the opinion of the Court.

This is a petition filed by the appellant contesting the election of the appellee, as Mayor of the City of Baltimore.

The petition alleges, that the appellee was returned as elected, and had taken the oath of office, and claimed to exercise the functions, and to be entitled to the salary payable to the Mayor of the City of Baltimore.

He further alleges, that the returns were false and fraudulent—that illegal votes were cast for the appellee, and that legal votes, which would have been cast for the petitioner were refused, and that owing to fraud and violence in certain precincts, the election in such precincts was altogether null and void.

The petitioner claims to have been duly elected to the office of mayor, and prays the Court to adopt such mode of proceeding, and prescribe such rules for taking testimony and adjudging costs as may seem most satisfactory and least expensive, and to provide also for the counting by the Court, or under its direction and supervision, of the ballots cast at said election, and the inspection of the poll-books returned, &c.

The Constitution of 1867 continued in force all Acts of Assembly not inconsistent with the provisions of that instrument, and it is claimed the Superior Court has jurisdiction to hear and determine a contest in regard to the election of mayor under the following section, and of Art. 35 of the Code, which were in force at the time the Constitution was adopted :

“Sec. 53. All cases of contested election of any of the officers not provided for in the Constitution, or in the preceding section, shall be decided by the Judges of the several Circuit Courts, each in his respective circuit, and by the Superior Court of Baltimore City, in Baltimore City.”

“Sec. 54. Each Judge of the Circuit Court and of the Superior Court of Baltimore City, may adopt such mode of proceeding in cases of contested elections, and prescribe such rules for taking testimony and adjudging costs as to him shall seem most satisfactory and least expensive.”

Conceding for the purposes of this case, the jurisdiction thus claimed, the question is whether an appeal will lie from the rulings and judgment of that Court.

It is admitted that the several sections of the Code above referred to, make no provision for an appeal, and the ques-

tion therefore, depends upon whether the judgment was rendered in a case of which the Court *had jurisdiction by virtue of its common law powers*, or whether it was a *special and exclusive jurisdiction conferred by the statute*, and to be exercised not according to *the common law*, but in a *mode and manner therein prescribed*?

If the Court acted under a special and exclusive jurisdiction, then, according to the well settled law of this State, its judgment in the premises is final and conclusive, unless the right of appeal is expressly given by the statute.

It was thus decided in the case of the *Wilmington and Susquehanna Railroad Co. vs. Condon*, 8 G. & J., 448, in which the Court said:

“There is no appeal expressly given to the Court of Appeals, under the Act of Assembly investing the County Courts with the power of hearing and setting aside inquiries like the present. It is a special limited jurisdiction given to the County Courts, from the decision of which no appeal lies to any other tribunal.”

And in the *Savage Manufacturing Co. vs. Owings*, 3 Gill, 498, it was also held, that the judgment of the Court below was final and conclusive. Judge CHAMBERS said:

“Jurisdiction of this proceeding is not exercised by the County Court in virtue of its general powers as a Court of common law, it is vested by a special delegation of power, and by the terms of the Act which conferred it, to be exercised not according to the forms and course of the common law, but in a special and peculiar mode.”

It is unnecessary to extend this opinion, by reference to the numerous decisions which the doctrine thus laid down, has been extended to analogous cases, because the law is too well settled to be questioned.

So the question comes down to this, was the judgment of the Court rendered in a case of which it had jurisdiction at common law, or was it a *special and exclusive*

*jurisdiction* conferred by the statute? And the true test seems to us to be, whether the Superior Court could, independent of the provisions of the Code, hear and determine a contest in regard to the election of mayor, upon a petition filed by the contestant, and direct the mode and manner in which the proceeding should be conducted. If it could, then it is clear, the Court of Common Pleas and the Baltimore City Court, being common law Courts, and having concurrent jurisdiction under the Constitution in all civil common law cases, have jurisdiction also to hear and decide a case of contested election. On the other hand, if it could not, then the Superior Court must act under a special jurisdiction conferred by the Constitution and the Code.

It is true at common law, Courts had jurisdiction by a writ of *quo warranto*, or by an *information in the nature of a quo warranto*, to hear and decide the title to an office, but such proceedings were instituted in the name of the King, for the purpose of ousting one unlawfully claiming to exercise the functions of an office, and to punish him by a fine for the *usurpation*. There is a wide difference however, between a proceeding thus instituted in the name of the King, and in this country, where such writs are in force, in the name of the people in right of their sovereignty, and a direct proceeding by a party claiming an office in his individual capacity, instituted under a power specially granted by the Legislature, and to be proceeded with, not according to the common law, but in a particular mode and manner prescribed by the statute.

The Legislature in carrying out the provision of the Constitution in regard to contested elections, meant to confer upon certain tribunals, sole and exclusive jurisdiction in such cases, and to clothe them with the power not only of hearing and deciding questions both of law and of fact without the intervention of a jury, but also to direct the mode and manner of the proceeding. And in all the

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provisions of the Constitution, and the several Acts of Assembly in regard to contested elections, we have not been able to find a single case in which the right of appeal is given. Independent of the rights of the contestants, the public interests require there should be an early and final decision in cases of this kind. And if the right of appeal is to be exercised, and the case is to be remanded for error of the Court below, with the right to either party to appeal again, it would not be a difficult matter to protract the contest until the term of office had expired.

Be that however as it may, we are of opinion, that the jurisdiction of the Superior Court in cases of this kind, is a special and exclusive jurisdiction, and there being no provision by the law for *the right of appeal*, its judgment in the premises is *final and conclusive*.

The motion to dismiss the appeal must, therefore, be sustained.

*Appeal dismissed.*

(Decided 1st March, 1877.)

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WILLIAM G. SCARLETT vs. THE ACADEMY OF MUSIC  
OF BALTIMORE CITY.

*Exceptions to Evidence—Action against a subscriber to stock in a Corporation to recover an assessment on the amount subscribed—Admissibility of parol evidence to vary the terms of subscription—Sufficiency of notice of assessment—Mistake—Agency—Construction of contract of subscription.*

Where an exception states that it was taken to the admissibility of certain evidence offered in the case, although it does not state what action was taken by the Court below upon the exception, it may be assumed that the exception was overruled and the evidence admitted.

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Where an exception was taken to all the evidence offered, and *especially* to a specified portion of it; and there was no question as to the admissibility of any but that part specially objected to, all except that being clearly admissible. **Held:**

That there was no error in overruling the objection to the whole.

In an action by the Academy of Music of Baltimore City, a body corporate, to recover from a subscriber to its stock an assessment or call on the shares subscribed by him, it appeared in evidence that D. was a well known merchant of Baltimore, who with others had undertaken the task of procuring subscribers to said stock, and as such being himself a subscriber and stockholder, had obtained the signature of the defendant to the contract of subscription given in evidence. The defendant offered in evidence certain representations made by D., under which he claimed to be released from liability under his subscription. On objection to the admissibility of this evidence, it was **Held:**

1st. That generally parol representations or agreements made at the time of subscribing for stock are inadmissible and void unless fraud is shown.

2nd. That the defendant not having added in writing to his signature, the terms of the representations, on the terms of which he claimed to have made his subscription, he cannot be allowed to add by parol testimony, other conditions to the terms of his written contract.

The evidence showed that the board of directors of said corporation, on the 7th of October, 1870, passed a resolution, that in case the committee previously appointed for that purpose, should conclude the purchase of a site for the building, the treasurer should notify the subscribers, that the first instalment of forty per cent. would be payable on a day to be fixed by the president, within thirty days thereafter, at the F. & M. Bank, and at the meeting of the board on the 31st of October, 1870, the committee reported the purchase, and the treasurer reported that he *had called* the assessment *as directed*, payable on the 10th of November, following. The notice of this call purporting to have been signed by the treasurer, was in effect as follows: "The stockholders of the Academy of Music of Baltimore City, are hereby notified that the first instalment of forty per cent. will be due and payable on the 10th inst., (to-morrow,) at the National Farmers' and Merchants' Bank," and it was proved that this notice was published in a newspaper printed in Baltimore City, on the 9th and 10th of November, 1870. **Held:**

1st. That from this, and the other evidence in the case, it was competent for the jury to find that the call was duly made by the board of directors, that C. was the then secretary of the corporation, and was duly authorized to

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give the newspaper notice of the call, that the time and place of payment was fixed and designated by the board of directors, and that such designation of time and place was in accordance with the resolution of the board of the 7th of October, 1870.

2nd. That under section 65 of the Act of 1868, ch. 471, which is substantially a re-enactment of sec. 49 of Art. 26 of the Code, it is immaterial whether the notice by publication required by those sections to entitle a corporation to sue its subscribers for assessments, be published for only one or for any number of days before the time of payment mentioned in it.

3rd. That all that the law requires, is that the notice shall be given by publication in a newspaper printed nearest the place where the principal office of the corporation is located, and one such publication before the day fixed for payment is sufficient.

By the terms of the contract of subscription which the defendant signed, he agreed to subscribe for stock in the "Baltimore Academy of Music." The corporate name of the plaintiff was, "The Academy of Music of Baltimore City," and the declaration averred that the "Baltimore Academy of Music" mentioned in the contract was the plaintiff, and that the contract was intended to be, and was in fact, made with the plaintiff. The proof showed that there was no other corporation in the City of Baltimore, which could possibly set up any pretence to this subscription, that all the subscriptions were taken like this in the name of the "Baltimore Academy of Music," and that when the enterprise was started it was commonly known by that name. **Held :**

1st. That this was quite sufficient to authorize the jury to find the averments of the declaration to be true, and that the defendant in fact subscribed, and in fact intended to subscribe for shares of the capital stock of the plaintiff, under the name of the "Baltimore Academy of Music."

2nd. That the obligation of the defendant rested upon the terms of the *contract*, and it matters not whether the person who solicited him to sign it, was a mere volunteer in obtaining subscriptions, or was expressly authorized so to do by the corporation.

The condition of the subscription was, that it was "not to be binding until stock amounting in the aggregate at par, to \$200,000, shall be subscribed."

**Held :**

That the true construction of this condition, was that the subscriptions should be binding on every subscriber when that sum was subscribed, and the amount to be subscribed by each one, whether he might be the party sued or not, was to be included in making up the aggregate amount.

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APPEAL from the Superior Court of Baltimore City.

The nature of this case and of the *first, second and third exceptions* is stated in the opinion of the Court.

*Fourth Exception.*—The evidence being concluded, the plaintiff offered the following prayer :

If the jury believe that the defendant subscribed for ten shares of the capital stock of the plaintiff, under the name of the "Baltimore Academy of Music," by signing the contract of subscription offered in evidence, and that two hundred thousand dollars of said stock was subscribed for before the instalment sued for in the declaration in this cause was called in, and if they shall further find that the said instalment was called in, and that the notice thereof offered in evidence in this cause was published in the "Baltimore American," a newspaper published in the City of Baltimore, more than ninety days before the institution of this suit, and that the principal office of the plaintiff was located in said City of Baltimore, and that said instalment has not nor has any part of it, been paid by the defendant to the plaintiff, then the plaintiff is entitled to recover the amount of said instalment, with interest in the discretion of the jury.

And the defendant offered the ten following prayers :

1. The defendant prays the Court to instruct the jury, that the notice by advertisement offered in evidence, is not in legal contemplation sufficient under the provisions of the Act of 1868, ch. 471, sec. 65.
2. That there is no evidence in this cause sufficient to establish that the call or assessment, sued for in this case, was duly made by the board of directors.
3. That there is not sufficient evidence in this cause that the corporation, plaintiff, duly appointed Mr. Cohen, treasurer of said corporation, prior to the 10th November, 1870, and that Mr. Cohen was duly authorized to give the newspaper notice offered in evidence, in manner and form as therein set forth.



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4. That under section 65 of the Act of 1868, ch. 471, it was the duty of the board of directors to establish the time and place of payment of assessments made or ordered by said board of directors, and that there is no evidence in this cause of such designation of time of payment.

5. If the jury find that Mr. Cohen, in giving the newspaper notice, acted solely under the authority of the resolution of October 7th, 1870, then the notice given is insufficient to charge defendant in this case.

6. If the jury find that the paper-writing signed by the defendant for subscription for stock, was brought to him by Mr. Devries, as stated in the evidence, and that the defendant signed the same at the request of said Devries, then the plaintiff cannot recover in this case, because there is no evidence that said Devries was the agent of the plaintiff, or had any authority to bind the plaintiff in manner as in said paper set forth.

7. That in order to recover under the pleadings and evidence in this cause, the jury must find that the subscription contract of the defendant for stock, was made by him with the plaintiff, with knowledge and intent so to do on his part, and that there is no sufficient evidence of such facts in this cause to identify the Baltimore Academy of Music with the corporation, plaintiff, as within such knowledge and intent of the defendant.

8. The defendant prays the Court to instruct the jury, that if the jury find that defendant signed the paper-writing offered in evidence, as his subscription for stock as therein stated, then such paper so signed by the defendant, is not binding in law as a valid contract between the defendant and the plaintiff bringing this suit.

1st. Because the plaintiff in this suit is not named in the said contract, and is no party thereto.

2d. Because there is no evidence offered to the jury that the name of the defendant was obtained to said paper-writing, by authority of the plaintiff in this case, or that

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plaintiff accepted the same price prior to the date of the call in this case.

9. If the jury find the signing by the defendant of the paper-writing offered in evidence as his agreement; to subscribe for stock, said agreement was upon condition that \$200,000 therein spoken of, should be subscribed by others, exclusive of the subscriptions there mentioned, before the conditional subscriptions should be operative and binding on the parties signing said agreement.

10. The defendant prays the Court to instruct the jury, that there is no sufficient evidence that the board of directors did fix the 10th day of November, 1870, as the time for the payment of the first instalment of the subscription for stock mentioned in manner and form as required by law under their charter, as set forth in the amended declaration filed in this cause.

The Court (DOBBIN, J.,) granted the prayer of the plaintiff, and rejected all the prayers of the defendant. The defendant excepted.

The jury rendered a verdict for the plaintiff, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER and ALVEY, J.

*Benjamin C. Barroll*, for the appellant.

The subscription in this case was not made in the name of this corporation plaintiff. The *narr.* avers that while this is true, yet it says that "The Baltimore Academy of Music" was intended to be, and was, in fact, "The Academy of Music of Baltimore City," the plaintiff aforesaid. That said contract was intended to be and was, in fact, made with the said plaintiff.

This covers the case in 13 *Md.*, 117; and one of the cases cited in that case, 5 *Halsted*, 323, from which I quote—"the misnomer of a corporation in a grant or obligation,

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does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation *designed* and *intended* by the parties to the instrument, be shown by proper and apt averments and *proofs*." 10 *New Hamp.*, 124; 3 *Md.*, 127. Now appellant complains that the question of design and intent was not fairly, if at all, put to the jury in the prayer of the plaintiff granted by the Court. The Court used this language in the instruction, "if the jury believe that the defendant subscribed for ten shares of the capital stock of the plaintiff, under the name of the 'Baltimore Academy of Music,' by signing the contract of subscription offered in evidence, &c." The Court makes the signing of the contract offered in evidence, the test and proof to the jury of the fact to be established. The signing of the contract was admitted, but the design and intent to contract with this corporation in so doing, was the fact to be submitted, and the absence of any proof of such design and intention, or even that defendant had the slightest knowledge of the existence of this corporation, was so apparent, that defendant offered his 7th prayer, which was refused because it required the finding by the jury, that Scarlett's contract was made with the plaintiff, with knowledge and intent so to do on his part—and that no evidence was offered by plaintiff showing such knowledge and intent. *The signing of the contract* proved nothing whatever as to *intent*, and the language of the plaintiff's prayer made the signing of the contract the only fact to be found by the jury, to establish a contract in law between Scarlett and this corporation. *Prima facie*, it is apparent from the contract itself, that the corporation was not one of the contracting parties—and it can only be made such, by showing *by competent evidence*, that Mr. Devries was acting for this corporation at the time he obtained the subscription, and that Scarlett intended to deal with this corporation, and in order to such intent, a knowledge of its existence as a

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corporation is indispensable. The plaintiff's prayer does not cover this ground, and was well calculated to mislead the jury.

*Mr. D. was the agent of the corporation and made the representations at the time of subscription, as its inducement and as part of the transaction—in fact they were the inception of the transaction.* And when the respectable gentleman discovered that the statements which had been the inducement, had proved to be untrue, he sought Scarlett and cancelled the subscription. This cancellation by mutual assent, was as effective as if the subscription paper had then and there been torn up, and the attempt to enforce it against Scarlett is a gross fraud upon Scarlett, and a manifest wrong to the high-minded gentleman concerned. To confirm his action in the part which is beneficial to the corporation, and to disaffirm it in the part which makes against, cannot be allowed. The corporation take the unworthy ground that Mr. D. was authorized (by subsequent ratification of his act,) to procure a subscription, but that the corporation is not bound by representations honestly made to induce the subscription, and to cancel it when the inducement failed.

The contract signed by Scarlett, required him to pay fifty dollars per share in such instalments, and at such times as may be fixed by the board of directors.

How was the instalment in this case called for?

On October, 7th, 1870, the board resolved, (hypothetically,) in case the committee should conclude the purchase of a site, the treasurer is hereby directed to notify the subscribers of stock, that the first instalment thereon of 40 per cent., will be payable *on a day to be fixed by the president*, within thirty days thereafter, at the F. & M. Bank.

Now it is clear that the board delegated to the president, the fixing of the time of payment. *Delegata potestas non potest delegari.* This is not only a maxim of common sense, but of the common law.

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The *narr.* in this case avers, that the board of directors did fix the tenth day of November, 1870, as the best time of payment of this instalment—this was a material averment, and was a fact to be found by the jury. Without such averment, the defendant could have demurred. Is it true? Has not the corporation plaintiff itself, proved that it is not true? Is not the day on which the instalment is to be paid, left first to the uncertainty of a purchase being concluded by a committee, and if concluded, then entirely to the discretion of the president. And stranger than all; is not the treasurer directed to notify the subscribers that the first instalment will be payable on a day to be fixed by the president, &c.? Did the board give the treasurer any other order or direction in the premises? And Mr. Lucas says: that so far as he knew, this resolution was the authority under which Mr. Cohen published the notice in the American. Does the newspaper notice in this case harmonize with the order given by the board of directors to its treasurer? How was this *call* of the treasurer made? He reported that he had called instalments as directed—he had fulfilled the duty—and his report was approved.

*The record book open before Court and jury, showed that he had given the notice by printed notices, through the post office, and one of said printed notices was pasted in said book, as the proof that he had so given the notice.*

By the 9th November, Cohen discovered that his notice, given and approved by the board, was illegal and worthless, and then resorted to the newspaper notice on his own authority—the authority under the resolution being exhausted—the board having ten days before approved his action of notice through the post office.

It is also to be noted, that the board of directors ordered by resolution, that the subscribers should have *thirty* days notice, whereas, the newspaper notice gave one day.

The question to be decided is, was this instalment duly called in and notified to the appellant?

(a.) The board could not delegate its power to the president in the manner set forth ; and even if the board could do so, there is not a particle of evidence, that the president fixed any time or ever acted under the resolution in any manner whatever.

(b.) The treasurer did not give the notice contained in the resolution, as directed

(c.) The treasurer gave the official notice through the post office, and reported it to the board, and the *board approved what he had done.*

(d.) The board provided by resolution, that subscribers should have 30 days for payment after notice, and the newspaper notice only allowed one day.

*H. C. Kennard*, for the appellee.

The charter and contract were properly admitted in evidence, the latter being coupled by the evidence in the second bill of exceptions, with the appellee. That evidence showing beyond a doubt that the contract sued on was, in fact, made with the appellee. It has long been established law that when mistakes are made in the names of corporations, in contracts with them, the corporations suing in their true corporate names have been allowed to recover; the only requirement being that the declaration shall contain an averment identifying the plaintiff with the contracting corporation, as in this case. *Hagerstown Turnpike Road Co. vs. Creeger*, 5 H. & J., 122; *N. Y. African Society vs. Varick*, 13 Johns., 38; *Balto. Cemetery Co. vs. First Independent Church of Balto.*, 13 Md., 123-6; *Newport Mechanics' Manfg. Co. vs. Starbird*, 10 N. H., 124-5; *Medway Cotton Manf. vs. Fisher, Adams, &c.*, 10 Mass., 368-9-70; *The Medford & Chillicothe Turnpike Co. vs. Brush*, 10 Ohio, 111-12-14-15; *Angell & Ames on Corporations*, sec. 647.

But, even if the variance was such as might prove fatal if availed of by demurrer or motion in arrest, it has been

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cured by verdict and judgment in this case, which establish the identity, if the evidence, was not overwhelming to that point.

It being admitted that Mr. Cohen had died since the trial in the Baltimore City Court, it was competent to prove his testimony upon that trial by a witness who was present at that trial, and recollected what he had testified to, such evidence, being, from the necessities of the case, admissible, and never excluded except in the single case when the witness recollects only a part of what the deceased witness had testified to. The witness in this case was present during the whole trial, and had Mr. Cohen's testimony impressed upon his memory for the double reason, that he was counsel in the case, and that Mr. Cohen was the only witness examined upon that occasion. It will be seen, that the testimony so given covers the whole contract, and recites all the facts necessary to the recovery; the witness, while saying that he recollects *substantially* what Mr. Cohen's testimony was, having detailed the *facts* testified to and not his *conclusions* from those facts, and that is all that the law requires. That is the word, "substantially" used by the witness, applied to the *language* of the deceased witness, not his *testimony*. And it cannot be contended that the contract sued on in this case is not the same contract, made between the same parties, as the contract sued on in the Baltimore City Court. The fact that the instalments sued for were different, cannot affect this principle, the *contract* being the thing regulating the right to recover any or all of the instalments. 1 *Taylor on Evidence*, p. 455, sec. 440; *Pyke vs. Crouch*, 1 *Lord Ray.*, 730; 1 *Greenleaf on Evidence*, secs. 163-4-5-6, (n. 1, p. 192;) *Phila. Wilm. & Balto. R. R. Co. vs. Howard*, 13 *How.*, 307, 334-35; *United States vs. McComb*, 5 *McLean*, 286; *Davis vs. State*, 17 *Ala.*, 354; *Black vs. Woodrow & Richardson*, 39 *Md.*, 219-20-21-22; *Garrott vs. Johnson*, 11 *Gill & J.*, 173-182-3-4; *Bowie vs. O'Neale*, 5 *H. & J.*, 231; *Calvert vs. Cox*, 1 *Gill*, 116.

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All of the testimony tending to identify the plaintiff in this case with the corporation named in the contract was not only admissible, but absolutely necessary, and that the newspaper notice, was properly admitted, and under the statute, Act of 1868, ch. 471, sec. 65, was one of the forms of notice specially required. *Hughes vs. Antietam Manf. Co.*, 34 Md., 331-2; *Busey vs Hooper*, 35 Md., 30-31; *Academy of Music vs. Scarlett*, 43 Md., 203.

The offer to prove by Mr. Scarlett, the defendant, certain verbal representations alleged to have been made to him by Mr. Devries at the time of subscribing, for the purpose of changing the contract of subscription by interpolating into it provisions or conditions, materially at variance with the contract of subscription, was properly rejected, especially as it had been stated and not denied, that Mr. Devries was "not the agent of the appellee for the purpose of making any representations to bind it."

The law is so well established as to be elementary, that parol representations or agreements made at the time of subscribing for stock in a corporation, and inconsistent with the written terms of the subscription, are inadmissible, inoperative and void. In fact, any other ruling would open the gate for fraud upon all the other subscribers who acted in ignorance of such parol representations. 1 *Taylor on Evidence*, p. 401, sec. 372; 2 *Taylor on Evidence*, p. 980, secs. 1035-6; *Conn. & Pass. Rivers R. R. Co.*, 24 Vt., 468-9, 476-7-8; *Piscataqua Ferry Co. vs. Jones*, 39 N. H., 491-7; *Smith vs. Plank Road Co.*, 30 Ala., (N. S.), 651-2-6, 667; *Johnson vs. Crawfordsville R. R. Co.*, 11 Ind., 280-4-5; *Thornburg vs. New Castle, &c. R. R. Co.*, 14 Ind., 500, 501; 4 *Jones, N. C.*, (Law,) 340-1-3-4-5; *Rives vs. Montgomery South Plank R. Co.*, 30 Ala., 97-8-9; *East Turnpike Va. R. R. Co. vs. Wm. Gammon*, 5 Sneed, 567-9-70-1-2.

The plaintiff's prayer was properly granted. The suit was on a contract setting forth explicitly the terms



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upon compliance with which the plaintiff, (appellee,) would be entitled to recover. This prayer simply asks the instruction that if the jury find that the plaintiff had complied with its part of this contract, and had given to the defendant the printed notice, it is entitled to recover. The sufficiency of this notice is the only question, and has been already decided by this Court. *Academy of Music vs. Scarlett*, 43 Md., 203; *Hughes vs. Antietam Manf. Co.*, 34 Md., 331-2.

The defendant's first prayer denies the sufficiency of this notice and was properly rejected. His second, third and fourth prayers ask for instructions directly in opposition to the evidence, and were properly refused. His fifth prayer states the proposition that the resolution of the board of directors, contained in the regular book of proceedings of the corporation, directing the treasurer to give to subscribers the newspaper notice offered in evidence, were not sufficient proof that he had authority to give the notice. It is hard to see how there could be any stronger or better evidence of his authority; but in addition to this, we have the positive evidence of Mr. Cohen, that he had such authority; and this prayer was properly refused. His sixth prayer involves the propriety of admitting the alleged parol representations to vary the contract of subscription and was properly rejected.

The defendant's seventh and eighth prayers object to the sufficiency of the proof identifying the plaintiff with the "Baltimore Academy of Music," the name in which the contract was made, which would appear to be as complete as it possibly could be, and was decided by this Court, when this case was last before it. The second part of the eighth prayer involves the novel proposition that *Mr. Devries' authority*, and not the *contract*, is to regulate the rights of the parties to this suit. As the contract was made in the name of the plaintiff, and the plaintiff chose to adopt it, it would seem that Mr. Devries' authority

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could not in any manner affect the right to recover, even if it was true, which it is not, that Mr. Devries had no authority to obtain the defendant's subscription. These two prayers were properly refused. The ninth prayer has already been passed upon by this Court; but even if it had not been, it totally disregards the evidence. The contract does not exclude the plaintiff's subscription in making up the \$200,000, and it was properly refused. The tenth prayer must be disposed of by the action of this Court upon the second, third, and fourth prayers, and for the same reason was properly refused. If Mr. Cohen's testimony is admissible at all, which it clearly is, he says distinctly, that the "board of directors directed the first assessment to be called in in October, 1870, payable on 10th November, 1870, and that it was called in *as directed*."

MILLER, J., delivered the opinion of the Court.

This is a suit by the appellee, a corporation incorporated under the general laws of this State authorizing the formation of corporations, against the appellant, a subscriber to its stock, to recover an assessment or call on the shares so subscribed. It is admitted the defendant subscribed for \$500, or for ten shares at \$50 each, by signing with others the following agreement:

"We, whose names are hereto written, agree to subscribe for stock, in the 'Baltimore Academy of Music,' to the amount set opposite our names respectively, and to pay for the same fifty dollars per share, the par value thereof, in such instalments, and at such times as may be fixed by the board of directors. This subscription however, not to be binding until stock amounting in the aggregate at par to two hundred thousand dollars shall be subscribed."

In the course of the trial three exceptions were taken to rulings upon the admissibility of evidence, and one to the

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granting of the plaintiff's single prayer, and the rejection of the ten instructions asked for by the defendant. The questions thus presented are now before us for review.

1st. If the objection in the first exception had been confined to the admissibility of the testimony of Mr. Kennard as to what Mr. Cohen, a deceased witness, had testified to in a former suit between the same parties in Baltimore City Court, it would have presented a question of some difficulty. But it is obvious, the objection is not thus restricted. The exception begins by stating that the plaintiff *offered* in evidence its charter, the subscription contract signed by the defendant, the testimony of Kennard as to what Cohen had sworn to in the former case, and the record of the proceedings of the board of directors containing certain resolutions relating to the call upon subscribers for a first instalment (that for which this suit is brought) of forty per cent. on their subscriptions, and then it is stated, "to the admissibility of *all which* testimony alleged, and *especially* to the testimony of Mr. Cohen as delivered in Baltimore City Court, as proven on this trial by Mr. Kennard, defendant excepted." On this it is not even stated what ruling the Court made, but we may assume that the objection was overruled, and the testimony admitted. It is plain however, that the objection is to *all* the testimony thus offered; for that is shown by the fact that special attention is called to *part* of it as well as by the general words "to all which testimony." There can be no question as to the admissibility of any of this testimony save that of Kennard, and all of it except that being clearly admissible, there was no error in overruling the objection to the whole. It has long been the settled practice of this Court that an appellant loses the advantage of his objection if any part of the evidence covered by the objection is admissible. *Budd vs. Brooke*, 2 Gill, 220; *Emory & Gault vs. Owings*, 3 Md., 185; *Wright vs. Brown*, 5 Md., 37; *Colvin vs. Warford*, 20 Md.,

387. The objection stated in the second exception is of the same character, and encounters the same fatal difficulty.

2nd. The third exception was taken to the refusal of the Court to allow the defendant to prove that when solicited to subscribe by Mr. Devries, he did so on the faith of certain representations made by the latter to the effect that the building would be built in a location on or near Baltimore street, convenient to the hotels and main thoroughfares, so that it would advance the interest of the Baltimore trade, by being an additional attraction to country merchants to come to Baltimore, and in that way would indirectly benefit all, and that all subscribers would be allowed an opportunity by the Academy to have a voice in deciding on a site for the building; that on these representations the defendant subscribed, and would not have done so without them; that none of these representations were fulfilled, and Mr. Devries thereupon called upon defendant, and told him that the representations made not having been fulfilled, he had the option to retain or to cancel his subscription, and defendant replied that he would not stand by his subscription, but consider it cancelled. As this was said in argument to be the main and substantial ground of defence, we have given it a careful consideration. It appears from the previous part of this exception, that Mr. Devries was a well known merchant of Baltimore, who, with others, had undertaken the task of procuring subscribers to take stock in an Academy of Music, to be built in that city for the public benefit, and as such, being himself a subscriber and stockholder, had obtained the defendant's signature to the contract given in evidence. When the defendant was about to detail the statements made to him by Devries, the plaintiff's counsel stated in open Court, that Mr. Devries was not the agent of the plaintiff, for the purpose of making any representations to bind the plaintiff, and it

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does not appear that this statement of counsel was denied. There is certainly nothing to show that he had any authority from the corporation to make these alleged representations, or to release any subscriber from the obligation of his written contract of subscription, or that such representations were fraudulently made, or that there was any collusion between the plaintiff and Devries to defraud the defendant, by making or having them made. In support of the admissibility of this evidence, much reliance was placed upon the case of *Swatara Railroad Co. vs. Brune*, 6 Gill, 41. In that case, the subscribers, by the terms of the written subscription contract, agreed to pay \$50 per share for the stock subscribed "in *such manner* and proportions, and at such times as shall be determined" by the company. It was then by *agreement* admitted that its president and treasurer were appointed by the company, a committee to come to Baltimore, and procure subscriptions for its stock, and that at the time the defendants subscribed, this committee represented to them that Tide Water Canal stock could be made available by the company, and would be taken at par by it in payment of any subscriptions to its stock, and that the defendants made their subscription, relying upon this representation and promise. The Court answer the objection, that the defendants, by setting up this defence, were attempting to contradict and vary the written contract by parol proof, in this way: "But it does not appear that if the defendants had been compelled to prove the undertaking and representation, they would have been obliged to resort to parol testimony. The fact then to be proved is admitted, and admitted perhaps, because of a knowledge that the defendants could have produced, if it was required, proof to which no such objection could be made. The evils to be apprehended from the admission of oral testimony, to add to or vary the written instrument cannot be argued *in this case*. A plaintiff cannot admit a *fact*, and then insist that

there must be written proof of it, or it is no fact in the case." A careful examination of that case has convinced us it is clearly distinguishable from this, and that what was there decided furnishes no guide for the determination of the question now under consideration. In *Angell & Ames on Corp.*, sec. 531, it is stated as the result of the authorities, that "generally parol representations or agreements made at the time of subscribing for stock, are inadmissible and void, unless fraud is shown." This general rule, though some few cases may be found in apparent conflict with it, it sustained by the decided weight of authority. Among the many other cases that might be cited in its support we refer to *Conn. & Pass. River Railroad Co. vs. Bailey*, 24 *Verm.*, 465; *Piscataqua Ferry Company vs. Jones*, 39 *New Hamp.*, 491; *Johnson vs. Crawfordsville Railroad Co.*, 9 *Ind.*, 280; *Thornburgh vs. Newcastle & Danville Railroad Co.*, 14 *Ind.*, 499; *Smith vs. Plank Road Co.*, 30 *Ala.*, 650; *Railroad Company vs. Leach*, 4 *Jones Law Rep.*, 340; *East Tennessee & Virginia Railroad Co. vs. Gammon*, 5 *Sneed*, 567. The facts in several of these cases bear a striking similarity to those in the present case. Thus in *Piscataqua Ferry Co. vs. Jones*, the written contract of subscription was in like terms, and it was proposed to prove by parol, that at the time the defendant subscribed, it was represented to him by the person, a member but not an officer of the corporation, soliciting the subscription, that the purpose of the corporation, was to build a horse ferry boat. In fact a steam ferry boat was afterwards built, and the enterprise proved unfortunate. The Court held this evidence entirely inadmissible, sustained the general rule, and assigned this very sensible reason why it should apply specially to cases for subscription for stock: "The defendant's putting upon paper an unconditional promise to pay, may have induced others not only to subscribe but to pay, and his attempts now to shield himself by this private understanding may be a fraud

upon others who may have thus been induced to subscribe and pay." Here the defendant's name was first on the subscription paper which he signed. It was quite competent for him to have added in writing to his signature, the terms of the representations on the faith of which he asserts he made the subscription. If he had done this, no after subscriber could have been misled or induced to subscribe by the fact of his subscription, without other conditions than those on the face of the paper itself. Not having done so, it seems to us to be a case in which the general rule is most appropriate, and that the defendant cannot be allowed to add by parol testimony, other conditions to the terms of his written contract. For these reasons we affirm the ruling excluding this testimony.

3rd. One of the questions raised by the instructions asked by the defendant, is whether there was sufficient notice given of the call upon the subscribers for the instalment sued for. It appears that the board of directors on the 7th October, 1870, passed a resolution that in case the committee previously appointed for that purpose, should conclude the purchase of a site for the building, the treasurer should notify the subscribers that the first instalment of forty per cent. will be payable on a day to be fixed by the president, within thirty days thereafter, at the Farmers' and Merchants' Bank, and that at the meeting of the board, on the 31st of October, 1870, the committee reported the purchase, and the treasurer reported that he *had called* the assessment as *directed*, payable on the 10th of November following. The notice of this call, purporting to be signed by the treasurer, was in effect as follows: "The stockholders of the Academy of Music of Baltimore City, are hereby notified that the first instalment of forty per cent., will be due and payable on the 10th inst., (tomorrow,) at the National Farmers' and Merchants' Bank," and it was proved that this notice was published in a newspaper printed in Baltimore City, on the 9th and 10th of

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November, 1870. From this and other evidence contained in the record, and which need not be stated at length, it was, we think, clearly competent for the jury to find that the call was duly made by the board of directors, that Mr. Cohen was the then secretary of the corporation, and was duly authorized to give the newspaper notice of the call, that the time and place of payment was fixed and designated by the board of directors, and that such designation of time and place, was in accordance with the resolution of the board of the 7th of October, 1870, that is to say, that the instalment called for was made payable at the designated bank, on a day fixed by the president, within thirty days after the contract of purchase of the site was concluded by the committee. We do not mean to be understood as saying that the finding of *all* these facts was essential to a recovery in this case, but the fact that there was sufficient evidence to authorize the jury so to find, meets and answers the objections set up in several of the instructions asked for by the defendant. Section 49 of Article 26 of the Code, was substantially re-enacted by section 65 of the Act of 1868, ch. 471, and it has been decided that the personal demand or notice by publication required by each of these sections, is a condition precedent to the right of a corporation to sue subscribers for assessments. *Hughes vs. Antietam Manufacturing Co.*, 34 Md., 316; *Scarlett vs. The Academy of Music*, 43 Md., 203. But there is nothing in either of them prescribing for what time the notice, if given by advertisement, shall be published before the day of payment. Each, however, allows the period of ninety days after the notice has been published for a stockholder to pay, before his stock can be forfeited, or he can be sued on the call, and this is all the indulgence the law gives to him. He is not required to pay at the time of payment fixed by the notice at the peril of forfeiting his stock, or of being sued on the assessment, but has the liberal time of ninety days after publication of



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the notice, within which he can avoid both forfeiture and suit by paying what is demanded of him. We are therefore of opinion it is immaterial whether the notice be published for only one, or for any number of days before the time of payment mentioned in it. All that the law requires is, that the notice shall be given by publication in a newspaper printed nearest the place where the principal office of the corporation is located, and one such publication before the day fixed for payment is sufficient. It follows there was no error in the rejection of the defendant's first, second, third, fourth, fifth and tenth prayers.

4th. By the terms of the contract which the defendant signed, the agreement is to subscribe for stock in the "Baltimore Academy of Music." The corporate name of the plaintiff is "The Academy of Music of Baltimore City." The declaration avers that the "Baltimore Academy of Music" mentioned in the contract was in fact the plaintiff, and that the contract was intended to be, and was in fact made with the plaintiff. As to the law on this subject there is no difficulty. It is well stated in *Angell & Ames on Corp.*, sec. 647. The name in the contract does not correspond exactly with the true corporate name of the plaintiff, but it does so substantially. The proof shows there was no other corporation in the City of Baltimore which could possibly set up any pretence to this subscription, and all the subscriptions to the plaintiff's were taken like this, in the name of the "Baltimore Academy of Music," and that when the enterprise was started it was commonly known by that name. This was quite sufficient to authorize the jury to find the averments of the declaration to be true, and that the defendant in fact subscribed and intended to subscribe for ten shares of the capital stock of the plaintiff, under the name of the "Baltimore Academy of Music," and the finding of this fact was left to the jury in terms sufficiently explicit, by the plaintiff's prayer. The further objection that the defendant was not bound by his

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subscription, because Mr. Devries was not the agent of the plaintiff is wholly untenable. His obligation rests upon the terms of the *contract*, and it matters not whether Devries, who solicited him to sign it was a mere volunteer in obtaining subscriptions, or was expressly authorized so to do by the corporation. There was therefore no error in the rejection of the defendant's sixth, seventh and eighth prayers.

5th. The condition of the subscription is, that it is "not to be binding until stock amounting in the aggregate at par to \$200,000 shall be subscribed," and it is contended that this means that that amount must be made up by subscriptions *other* than those on the paper which the defendant signed. This objection goes to the extent of saying that if the subscriptions on this paper had amounted to \$200,000, no one of the subscribers thereto would be bound, unless the same amount had been subscribed on another paper by other parties. That is not, we think, the true construction of this condition. It means that the subscription shall be binding on every subscriber when that sum is subscribed, and the amount subscribed by each one, whether he may be the party sued for his subscription or not, is to be included in making up this aggregate amount. The defendant's ninth prayer was therefore properly rejected.

It does not appear from the record that any objection was taken at the trial to the plaintiff's prayer, which was granted, because of the assumption therein of any fact, and we cannot therefore, under Rule 4, regulating Appeals, (29 Md., 2,) hold it defective for that reason. We find no error in the granting of it which would justify a reversal of the judgment.

*Judgment affirmed.*

(Decided 1st March, 1877.)

ALLEN E. FORRESTER, JAMES AIREY and EZEKIEL  
SCARBOROUGH vs. STATE OF MARYLAND, use of  
JOSEPH S. KERNAN.

*Action on trustee's bond—Principal and surety—Hearsay and  
irrelevant Evidence—Presumption on appeal—Estoppel—  
Guardian and Ward.*

An action was brought in March, 1874, by the State, for the use of K., on a trustee's bond to recover the balance of a sum of money arising from a trustee's sale made by F., and audited to K. then a minor. The sureties filed several pleas, on demurrer to one of which, it was HELD:

1st. That K. was under no legal obligation to inform the sureties that F. had become embarrassed, or that he had invested K's money, or that K. had declined to accept such investment.

2nd. That it was the duty of the sureties to make inquiries, and to see that their principal discharged the obligation resting upon him, whether he was then solvent or insolvent.

Evidence was offered by the defendants in said action, consisting of declarations of S., not a party to the suit, without any evidence having been previously introduced, and without any offer to follow it up with evidence to show that he was K's attorney, or agent, or in any manner authorized by him to make such statements or declarations. HELD:

That the statements thus sought to be introduced, consisted of hearsay simply, and were properly excluded from the jury.

Where the record fails to show that evidence was admitted subject to exception, and it does not appear that the Court below passed upon a motion made to exclude the same, and there is no exception in the record with respect to the matter, it must be presumed by this Court that the evidence was admitted without objection.

Case of evidence excluded as having no relevancy to the issue before the jury. HELD further in the above action:

1st. That when the auditor's account was ratified, F. as trustee became liable to pay on notice thereof and demand, and K. entitled to receive the sum of money audited to the latter.

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2nd. That until the money due K. was either paid to him, or invested according to his directions, F's sureties remained liable to K. on the bond.

F. and his wife made a deed to K. of certain property on Hoffman street, which was absolute on its face. The deed was executed and recorded without K. having been consulted with respect to it, and without any knowledge on his part of its having been done until some time afterwards, and after F. was shown to have been in very embarrassed circumstances. That property was subsequently sold under a mortgage, and K. applied by petition to the Court having the distribution of the proceeds of sale, to have the balance of the purchase money after the payment of the mortgage debts, applied to the payment of his debt, which was accordingly done. His petition did not state whether he had accepted the deed in satisfaction of his debt or as collateral security for its payment. **HELD:**

1st. That K. was not estopped from denying in the present action, that he accepted the deed of the property in satisfaction of his debt, or showing that he accepted it only as security for his payment.

2nd. That the use that K. made of the deed upon his petition to have the surplus of the property thereby conveyed, applied to the payment of his claim against the trustee, was perfectly consistent with the fact that he had accepted it as collateral security for its payment; and such acceptance in no manner affected or altered the liability of the sureties on the bond.

**HELD** further :

1st. That the guardian of K. during his minority had no right, without authority from the Orphans' Court for that purpose, to invest her ward's money, and certainly none to confer such right upon the trustee.

2nd. That even if the trustee had received such authority from K. himself after he was of full age, neither the trustee nor his sureties would be released from their liability on the bond, unless the authority to invest had been executed in good faith for the benefit of K.

**APPEAL** from the Superior Court of Baltimore City.

The case is sufficiently stated in the opinion of the Court.

The jury rendered a verdict for the plaintiff, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER and ALVEY, J.

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*Sebastian Brown*, for the appellants.

The bondsmen at least, are not liable in this action. Because the guardian of Kernan, while he was a minor, and himself, after he became of age, authorized and permitted Forrester to invest the money due Kernan.

When the auditor's account was ratified, the money became due and payable by Forrester, trustee, to the guardian of Kernan. Up to that time she had no authority or control over the funds. Forrester had no authority under the audit but to pay the money. When she directed him to invest the money, she asserted her control over it, and by that act the fund was passed from Forrester, trustee, to Forrester, attorney, just as effectually as if the money had passed and re-passed between him and the guardian. The dealings between the guardian, and Kernan himself, and the trustee, were adverse to the interests of the sureties. When Kernan became of age, in June, 1871, Forrester had been authorized for nearly two years by the guardian to invest the money, and Kernan then also authorizes him to invest, which authority extends apparently for two or three years. Whatever dealings with the principal which might by *possibility* vary the sureties' liabilities discharges them. *Mayhew vs. Boyd*, 5 Md., 110.

And the sureties are discharged even though they are benefited by such dealings. *Obendorff, Trustee vs. Union Bank of Baltimore*, 31 Md., 130-131; see also, *Hayes vs. Babbitt*, 34 Md., 516; *O'Hara vs. Shepherd*, 3 Md. Chan., 312; *Burnet vs. Courts*, 5 H. & J., 78; *Nesbit vs. Smith*, 2 Brown's Chan., mar. 583; 1 *Story's Eq. Juris.*, sec. 325; *McCullough vs. Franklin Coal Co.*, 21 Md., 256.

On January 11th, 1873, a deed from Forrester and wife to Kernan of property on Garden street was recorded in the clerk's office of the Superior Court of Baltimore City. The deed is absolute on its face and contains a covenant of special warranty. The property at the time was subject

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to two mortgages, one of which was on it when Forrester purchased the property, and the other was put on it by Forrester and wife. These mortgages are not recited in the deed. Kernan claims that he knew nothing of the deed until some time after it had been recorded, and that when brought to his notice he accepted it only as collateral security. Forrester claims that the deed was given in absolute payment.

The property covered by this deed was sold under the first mortgage by a decree of the Circuit Court of Baltimore City, passed in the case of *Brown, et al. vs. Craig, et al.* Kernan filed a petition in this cause claiming to be the owner and purchaser of the property, and asking that the balance of the proceeds be paid to him, as such owner and purchaser, which was done.

Now we hold that if Kernan accepted this deed after it was made and put upon the record, without any previous arrangement or understanding between him and Forrester as to the character of the conveyance, the terms of the deed must be explained by the deed itself, and this is more especially true, when to permit its character to be changed by parol testimony, innocent parties must suffer.

Because a man cannot receive a benefit under a deed and then claim that the deed is different from what its face discloses. *Lanahan vs. Latrobe*, 7 Md., 268.

The instrument must explain itself except as to the amount of consideration. *Cole vs. Albers, et al.*, 1 Gill, 412; *Baxter and Wife vs. Sewell*, 3 Md., 334; *Hutchins, et al. vs. Dixon*, 11 Md., 29.

The deed having been accepted, then if any loss was sustained by Kernan he had his action on the covenant of special warranty. When a deed is taken with special warranty, the only action is then on this covenant. Though Forrester may have said the property was free from incumbrance, still if sued on the warranty, he might have a good defence. *Timms and Wife vs. Shannon*, 19 Md., 316; *Middlekauf vs. Barrick*, 4 Gill, 290.

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Kernan having by his petition claimed to be the owner and purchaser of the property, he is estopped from claiming that he accepted it as collateral security. All of the testimony offered by him, therefore, for the purpose of proving that it was accepted as collateral security, should have been excluded and the motion of defendants (incorrectly incorporated in his ninth prayer,) should have been granted. It makes no difference that this petition was signed only by the attorneys for Kernan; he is bound by the acts of his attorneys. *Henck vs. Todhunter*, 7 H. & J., 275; *Bethel Church vs. Carmack*, 2 Md. Chan., 143.

*Henry C. Kennard and John H. Thomas*, for the appellee.

Kernan was under no obligation to inform Forrester's sureties, Airey and Scarborough, that Forrester became embarrassed, in the fall of 1872, and assumed to invest his, Kernan's money, in Forrester's own property, on his, Forrester's, own terms, and that Kernan had declined to accept said investment. The debt had been due since September, 1869, Forrester had been already in default for three years. His sureties had, for that length of time, been under the obligation to make him perform his duty, or themselves to make good his default. The averments of the appellants' seventh plea would therefore, even if they had been true, have constituted no defence, and the Court rightfully sustained the demurrer thereto.

What Forrester is alleged to have told his sureties, for the purpose of allaying their apprehensions, in the absence of Kernan, was not admissible against Kernan. There was no proof, nor the offer of any, except Forrester's statement, that Shipley ever was Kernan's attorney. Shipley himself testified that he never was. There was no testimony to the contrary. But even if the proposed testimony of Scarborough and Airey had been accompanied with an offer thereafter to prove that Shipley was, at the time referred to, the attorney of Kernan, it would

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still have been proper to exclude evidence of what he had said or done *until* proof that he was such attorney had been *first* given. *Marshall vs. Haney*, 4 Md., 498; *Atwell vs. Miller*, 11 Md., 348; *Rosenstock vs. Tormey*, 32 Md., 182.

Even if he had been the attorney of Kernan, and there had been legal proof of that fact, his declarations, under the circumstances assumed, not in the discharge of his duty, would not have been admissible against Kernan.

The accounts between Mrs. Willoughby, *individually*, and other persons, were properly excluded. The guardian of Kernan could not herself, without the authority of the Orphans' Court, have invested his money, otherwise than at her own risk. She had no power to authorize Forrester to make any investment of it. Even if she had given him express authority to invest it, that would have been no defence as against Kernan.

Still less would the fact that she had allowed him to *retain* it for investment, or, that she had directed him to *keep* it in some safe place until he should come of age, be any defence to a suit for not paying it after the ward had attained his majority.

The acceptance by Kernan of the deed from Forrester and wife to him did not exonerate the appellants from their liabilities for the balance of the money due to Kernan, although such balance may have been the consideration for said deed. Such balance *was* the consideration for said deed, whether said deed was taken as payment of it, or as collateral security therefor. Taking it as collateral security, unaccompanied by any agreement for an extension of time, or by any other agreement whatever, except the implied one to give credit for what might be realized from the property, could not possibly have prejudiced the sureties, nor can it avail as a defence. *Brengle vs. Bushey*, 40 Md., 141-7.

The actual agreement under which it was accepted could have been proven, even as between the parties to it.



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*Baughner vs. Merryman*, 32 Md., 186, 191; *Russell vs. Southard*, 12 Howard, 139, 147.

The rules which exclude parol testimony to contradict or explain written instruments is only applicable as between the parties to such instruments. Scarborough and Airy could have given parol testimony to explain or even contradict a deed to which Forrester and Kernan only were parties. Such testimony being admissible in their favor, is equally so as against them. *Barreda vs. Silsbee*, 21 Howard, 169; *Planters' Ins. Co. vs. Deford*, 38 Md., 396-7.

GRASON, J., delivered the opinion of the Court.

This suit was instituted on a trustee's bond to recover the balance of a sum of money arising from a trustee's sale made by Forrester, and audited to the appellee, then a minor.

The sureties filed nine pleas, the seventh of which was demurred to, and the demurrer was sustained, and the first question presented in the case is whether the ruling in this respect was correct or not. The plea alleged that without their knowledge, but to the knowledge of Kernan, Forrester became embarrassed pecuniarily in the fall of 1872, and that Kernan, thus knowing Forrester to be embarrassed, asked him what investment he had made of the money of said Kernan, and was told that he had invested it, or part of it, in property on Hoffman street, and that Kernan declined to accept the same, but did not then, or afterwards, inform the defendants either that Forrester was pecuniarily embarrassed, or that such investment had been made by him, and that by reason of such information not having been imparted to them, they had lost the opportunity of securing themselves against any loss they might sustain on account of their suretyship on the bond mentioned in the declaration, and protest that at that time, their liability on the bond ceased.

Kernan was under no legal obligation to inform them that Forrester had become embarrassed in the fall of 1872, or that he had invested Kernan's money as before stated, or that Kernan had declined to accept such investment. It became Forrester's duty to pay over the money as early as 1869, and he had been in default from that time. It was the duty of his sureties to make inquiries, and see to it that their principal discharged the obligation resting upon him, whether he was then solvent or insolvent. Therefore, even if the facts alleged in the seventh plea were all true, as they are admitted to be by the demurrer, they furnish no legal defence to the plaintiff's recovery, and the demurrer was properly sustained. The evidence set out in the first exception, was clearly inadmissible. It consisted of declarations of Shipley, not a party to this suit, without any evidence having been previously introduced, and without any offer to follow it up with evidence to shew that he was Kernan's attorney or agent, or in any manner authorized by him to make such statements or declarations. The statements thus sought to be introduced consisted of hearsay simply, and were properly excluded from the jury.

The defendants filed a motion to have withdrawn from the jury evidence offered by the plaintiff, to prove that the deed from Forrester and wife to Kernan, of the Garden street property, was given as collateral security for the debt due the latter, said evidence, as they allege, having been received subject to exception and being inadmissible. The record nowhere shows that such evidence was admitted subject to exception, nor does it appear that the Superior Court passed upon the motion, nor is there any exception in the record with respect to this matter, and we must therefore presume that the evidence was admitted without objection from the defendants.

The second exception is taken to the granting of the plaintiff's two prayers, and to the refusal to grant all the

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prayers of the defendants, except the sixth, which was granted.

The plaintiff's second prayer asked the Court to exclude from the consideration of the jury all the evidence which had been admitted, subject to exception, to show the state of accounts between Forrester and Mrs. Willoughby individually, and Shipley. The accounts between these parties could have no relevancy to the issue before the jury, as they did not tend to prove what sum, if any, was due by Forrester, trustee, to Kernan, or to prove or disprove the liability of the sureties in the bond to pay the sum for which their principal was in default. They were therefore inadmissible, and were correctly withdrawn from the jury under the plaintiff's second prayer.

When the auditor's account was ratified, Forrester, as trustee, became liable to pay on notice thereof and demand, and Kernan entitled to receive the sum of money audited to the latter. Whether Forrester's sureties would have been released from their liability if Kernan after he came of age, had authorized and directed the trustee to invest the said money for him, and it had been so invested, it is unnecessary now to consider, because it is not contended, nor is there any proof to show that it was so invested. On the contrary, it appears in proof that Forrester invested it in the Hoffman street property, and upon Kernan declining to assent to that investment, he purchased the Garden street property, which was then subject to a mortgage, took the title in his own name and afterwards mortgaged it for his own purposes. Until the money due Kernan was either paid to him, or invested for his benefit according to his directions, Forrester's sureties remained liable to Kernan on the bond. It was contended, however, that as Kernan had received a deed for the Garden street property from Forrester and wife, the consideration for which was stated to be six thousand dollars, and because the deed is absolute upon its face, it must be taken

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and held as payment and satisfaction of the debt due by Forrester, trustee, to Kernan, and that the sureties are consequently released. The deed, however, was executed and recorded without Kernan having been consulted with respect to it, and without any knowledge on his part of the fact of its having been done until some time afterwards, and after Forrester is shown to have been in very embarrassed circumstances. When the property was sold under the mortgages, Kernan applied by petition to the Court having the distribution of the proceeds of sale, to have the balance of the purchase money, after the payment of the mortgage debts, applied to the payment of his debts, which was accordingly done. The petition did not state whether he had accepted the deed in satisfaction of his debt or as collateral security for its payment. It was only necessary to show the Court that he held the title to the property, subject to the mortgages, in order to entitle him to receive the surplus proceeds of sale. He is not therefore estopped from now denying that he accepted the deed of the property in satisfaction of his debt, or showing that he accepted it only as security for its payment. The proof shows that he did accept it as collateral security, as he had the legal right to do, and the defendants have no cause to complain that he did so, as it has diminished *pro tanto* their liability on the trustee's bond. The use that Kernan made of the deed upon his petitioning to have the surplus of the proceeds of the property, thereby conveyed, applied to the payment of his claim against the trustee was perfectly consistent with the fact that he had accepted it as collateral security for its payment; and such acceptance in no manner affected or altered the liability of the sureties on the bond. *Brengle vs. Bushey*, 40 Md., 149. They were still liable on the bond for the balance of the debt due by their principal to Kernan, after deducting the payments made to him by the trustee, and the sum realized from the proceeds of the

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Garden street property. Mrs. Willoughby, who was the guardian of Kernan during his minority, had no right without authority from the Orphans' Court for that purpose, to invest her ward's money, and certainly none to confer such right on the trustee; and, as we have before said, even if the trustee had received such authority from Kernan himself after he was of full age, neither the trustee nor his sureties would be released from their liability on the bond, unless the authority to invest had been executed in good faith for the benefit of Kernan, which the proof shows has not been done. It follows, therefore, that the appellee's prayers were properly granted, and the appellants' rightly rejected.

*Judgment affirmed.*

(Decided 1st March, 1877.)

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SOLOMON DEUTSCH and WILLIAM DEUTSCH, use of  
SIMON KANDERS *vs.* JAMES BOND.

*Statute of Frauds—Collateral undertaking to pay the debt of another—Case of reversal of judgment without awarding a new trial.*

D. & Co. sued B. upon the following agreement signed by B. and others, but not under seal. "We the undersigned take pleasure in recommending S. to D. & Co. We also severally agree to become responsible for \$350 to said D. & Co. to be forthcoming in thirty days after the final delivery of the work." HELD:

- 1st. That the consideration for this guaranty could not be collected, or implied with certainty from the instrument itself without recourse to parol proof, or to other papers unconnected with it save by such proof.
- 2nd. That parol testimony for the purpose of showing that the guaranty did refer to a contract between S. and D. & Co., and thus make out a consideration for it, was wholly inadmissible if objected to.

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3rd. That such testimony having been introduced in the Court below *without objection*, an instruction by the Court below, that the guaranty was not sufficient to bind the defendant for want of a consideration, was wrong, and the judgment of that Court must be reversed; but,

4th. That inasmuch as it was apparent, that upon a new trial this testimony would be rejected, and there appeared to be no other possible ground on which the plaintiffs could recover, no new trial would be awarded, without good cause shown in a special application therefor by the plaintiffs' counsel.

The cases of *Nabb vs. Koontz*, 17 *Md.*, 283, and of *Mitchell vs. McCleary*, 42 *Md.*, 374, distinguished from the cases of *Hutton vs. Padgett*, 26 *Md.*, 228, and *Frank vs. Miller*, 38 *Md.*, 450.

#### APPEAL from the Court of Common Pleas.

The case is stated in the opinion of the Court.

*Exception.*—At the trial the plaintiffs offered the following prayer:

1. If the jury shall believe from the evidence, that the contract in writing offered and admitted in evidence between Deutsch & Co. and George W. Simpson, was performed in accordance with the various provisions therein contained as testified to by plaintiffs' witness, Wm. Deutsch, and that 300 copies of said work entitled, "Female Instructor and Guide to Health," were delivered and accepted by said Simpson, and that the balance remain subject to the order of said Simpson in the possession of the plaintiffs, at the request of said Simpson, and that shortly after the signing of said contract as testified to by said Deutsch, a paper-writing in evidence signed by the defendant, was handed, and in compliance of said contract made with said Simpson, and that said defendant did sign the said paper-writing, together with the other persons whose signatures are thereto attached, and that the said Simpson is insolvent, then their verdict shall be for the plaintiffs, upon the responsibility incurred by the said defendant by said paper-writing, to the amount of the balance due, with interest, for the printing of said work, "Female Instructor and Guide to Health."

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And the defendant offered the three following prayers which were rejected also.

1. That upon the evidence the plaintiffs are not entitled to recover, because no liability attached to the defendant, by the instrument of writing or guaranty offered in evidence, there being no sufficient consideration mentioned in said instrument of writing.

2. That there is no evidence in the cause from which the jury can find that the work was delivered, and that it was not paid for within thirty days of its delivery and before the institution of this suit, and they must find for the defendant.

3. That if from the evidence, the jury shall believe that Bond signed the paper offered in evidence, with the express understanding that the number of signers should be twenty, as indicated upon the paper by the numerals, and that the paper was in its present condition (except the interlinings) shown to Wm. Deutsch, one of the firm, by Simpson, for the purpose of informing him of his progress in getting signatures, and it was then understood by said Deutsch, that said Simpson's original intention was to procure twenty names to the paper, then that was sufficient to put Deutsch upon inquiry, and if they shall find also, that said Deutsch by his voluntary act caused said Simpson to cease his endeavors to procure signatures to the paper, and took into his possession the said paper without the knowledge or consent of said Bond, then the plaintiffs are not entitled to recover, and they must find for the defendant.

The Court, (GAREY, J.,) refused the plaintiffs' prayer and all the defendant's prayers, and granted the following instruction in lieu of the defendant's first prayer.

"The Court instructs the jury that the paper-writing given in evidence, for the purpose of holding the defendant as a maker thereof, is not sufficient for that purpose, for want of a consideration expressed therein, and that

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the plaintiffs cannot recover in this action." The plaintiffs excepted.

The jury rendered a verdict for the defendant and judgment was entered accordingly. The plaintiffs appealed.

The cause was argued before BARTOL, C. J., STEWART, GRASON and MILLER, J.

*Rufus W. Applegarth*, for the appellants.

The original debt having been founded upon a good consideration, and the guaranty given before the work was undertaken or the debt incurred, and having been the inducement for performing the work, then the consideration for the original contract is a consideration also for the guaranty, and is not necessary that it should be stated in express terms in the guaranty. *Nabb vs. Koontz*, 17 *Md.*, 283, and the case there cited.

The paper-writing "Exhibit, No. 2," is a sufficient promise in writing under the Statute of Frauds, the consideration therefore appearing by necessary inference, which is all that is required. The agreement of the defendant to be responsible to the plaintiffs for \$350, in thirty days after the final delivery of the work, the consideration for which, the delivery of the work, may be fairly inferred to sustain the guaranty, and the Court was therefore in error in instructing the jury, that the plaintiff could not recover for the want of a consideration expressed in the written guaranty. *Hutton vs. Padgett, et al.*, 26 *Md.*, 228, and the case there cited. See also *Mitchell vs. McCleary*, 42 *Md.*, 374, where in a similar case the Court say, page 377, "It is conceded, that the fact that there is no direct consideration set out in the guaranty is covered by the decision in *Nabb vs. Koontz*, 17 *Md.*, 283."

*Ed. B. Bates*, for the appellee.



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MILLER, J., delivered the opinion of the Court.

The appellants sued the appellee upon the following agreement signed by him and others, but not under seal.

"We, the undersigned, take pleasure in recommending G. W. Simpson, M. D., to Deutsch & Co. We also severally agree to become responsible for three hundred and fifty dollars to said Deutsch & Co., to be forthcoming in thirty days after the final delivery of the work."

The Court instructed the jury that this instrument was not sufficient to bind the defendant, for want of a consideration expressed therein, and that the plaintiffs could not therefore recover in this action.

It appears from the record, that Doctor Simpson, and the plaintiffs, Deutsch & Co., who were printers, entered into a written contract, by which the latter, in consideration of \$400, to be paid them by the former, agreed to furnish him one thousand copies of the work, entitled "Female Instructor and Guide to Health," of which he was the author, and he agreed to pay them this sum within thirty days after completion of the sheets of this book, and to that end, for their further security, "gives them," (as the contract expresses it,) "a written guaranty signed by a number of responsible parties to the amount of \$350," and it is contended that the consideration for this contract, is a consideration also for the guaranty on which this suit is brought. Such may have been the intention of the parties, but the question is, has that intention been carried out in the mode which the law imperatively requires? In *Hutton vs. Padgett*, 26 Md., 228, this Court re-affirmed what had been established by other decisions in this State, and what has been the settled law in England, ever since the case of *Wain vs. Walters*, 5 East, 10, "that to bind a party upon a collateral promise to answer for the debt or default of another, it is necessary, under the Statute of Frauds, that the consideration as well as the promise should appear from the writing." They also add, what is

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equally well settled, that it is not necessary the consideration should be stated in express terms, but it is sufficient if it can be collected or implied, "with *certainly* from the *instrument itself*." And in *Frank vs. Miller*, 38 Md., 450, it was also said to be the settled law that in such a case reference could not be had to other papers or writings unconnected with the guaranty, and which could not be connected with it, except by the aid of parol proof, and that to allow the connection to be made out by such proof, "would be an evasion of the Statute, and would open the door to the very mischiefs the Statute was intended to prevent." But it has been earnestly argued that the case of *Nabb vs. Koontz*, 17 Md., 283, sustains the position taken by the appellants' counsel. That case, however, was referred to in *Hutton vs. Padgett*, in support of both propositions, which the Court there affirm. It was a case where a guaranty, by a third party, was written *upon* a promissory note at the *same time* that the note itself was executed and delivered to the payee, and was in these terms: "I hereby guarantee the payment of the *above note* of Elizabeth D. Nabb, on maturity." It was in view of that state of facts, that the Court said, "where the written promise of the principal debtor sets forth or imparts a consideration, and the undertaking of the guarantor *refers to the original indebtedness*, and is made and delivered to the creditor at the same time, this objection under the Statute of Frauds does not apply, and the guaranty is good." All the authorities cited in support of that proposition, were cases almost identical with the one then before the Court, where absolute guaranties had been endorsed on notes contemporaneously with their execution, and where both instruments taken together made but one transaction and one contract, thus making it clear that the consideration which upheld the one might be taken to support the other, and that such consideration could be made out with certainty from the face of the instrument itself, without any aid from

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parol proof, and thereby making a case where the plaintiff could proceed in his action, without any resort to such proof, further than to show identity of time. We have examined that case with care, as the opinion is a very able one, evidently prepared after much consideration, and we entirely approve the doctrine it announces and establishes, but we are satisfied it is not in the slightest degree in conflict with the decisions in *Hutton vs. Padgett*, and *Frank vs. Miller*. So far from that, the Court say they would not disturb the case of *Aldridge vs. Turner*, 1 G. & J., 427, where the guaranty was written on the note itself, but point out the difference between that case and the one they were considering, viz., that in *Aldridge vs. Turner*, it did not appear at *what time* the guaranty was written on the note, and the pleadings indicate it was done *after* the note had been made and delivered to the plaintiffs. The case of *Mitchell vs. McCleary*, 42 Md., 374, was similar to that of *Nabb vs. Koontz*, and was decided upon the authority of the latter. There the guaranty on its face, refers in explicit terms to the lease, and sufficiently indicates that it was written upon, and as part of it, but this latter fact, (though not expressly so stated in the report,) was more clearly shown in the pleadings which admit the guaranty was in truth a *part of the lease*, and was executed prior thereto, and as a condition precedent to the making of the lease. And it thus appears that, in this respect, that instrument was drawn in conformity with the usual practice in this State, where security is exacted by the lessor for payment of the rent.

The present case must, therefore, be tested by the uncontroverted law of Maryland, as stated in the two first cases to which we have referred. Can the consideration for this guaranty be collected or implied with *certainty* from the *instrument itself*, without recourse to parol proof, or to other papers unconnected with it, save by such proof? We are all clearly of opinion, this question must receive

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a negative answer. The alleged guaranty was not attached to, endorsed on, or otherwise by direct reference on its face, made part of the contract to which it is supposed to refer ; and it seems to us quite impossible, for any one reading it by itself, to say that it distinctly, definitely and certainly refers to this contract, and the work to be done under it. It nowhere mentions this contract, and what "the work" is which it does mention, no one can tell with certainty without aid from the oral testimony of witnesses. This difficulty was in fact so apparent to the plaintiffs in the trial of the case, that they introduced such testimony for the very purpose of showing that the guaranty did refer to the contract, and in this way to make out a consideration for it. Such testimony was wholly inadmissible, but it appears by the record to have been admitted, and received without objection. If it had been objected to and excluded, the Court's instruction would have been entirely correct, but it was, we think erroneous, in view of the testimony so admitted, and for that reason the judgment in favor of the defendant must be reversed. But it is apparent from what we now decide that upon another trial this testimony will be rejected, and as we can see no other possible ground on which the plaintiffs can recover, we shall reverse the judgment, and not award a new trial, without good cause shown in a special application therefor by the appellants' counsel.

*Judgment reversed.*

(Decided 1st March, 1877.)

THE PROVOST, MAGISTRATES AND TOWN COUNCIL OF  
THE ROYAL BURGH OF DUMFRIES *vs.* ELIZABETH  
S. ABERCROMBIE, and others.

*Leasehold Estate regarded as personalty, for testamentary purposes—Legislative power to vary the terms of a trust—Case of invalid bequest—Charitable uses—Practice in the Court of Appeals.*

A disposition of leasehold estate must be treated as a testamentary disposition of personal estate.

It is altogether beyond the scope of legislative power in this State to authorize a variation or departure from the terms of a trust.

A resident of the City of Baltimore, died in the year 1873, leaving a will, by the first clause of which he bequeathed as follows: "I do hereby order and direct that the house and side lot where I now reside, situated \* \* \* be sold by my executors hereinafter named, as soon after my death as they may deem expedient and on such terms as they may think best; and I do hereby devise and bequeath the proceeds therefrom arising to the Magistrates and Town Council of the Royal Burgh of Dumfries, the County Town of Dumfriesshire, Scotland, to be paid over to them by my executors aforesaid, together with such rents and profits of said property as may accrue up to the time of said sale, and which said executors shall collect: in trust \* \* that they the said Magistrates and Town Council shall permanently invest said rents and profits and the proceeds of said sale in government stocks or in other safe and profitable securities, and pay over the interest and dividends of such investments as they accrue and are received to the High School of Dumfries which is under their direction and care, either by increasing the salaries of teachers, or providing scholarships. Or in such manner as may seem best to said trustees and most likely to promote the cause of education and elevate the standard of instruction in the said High School of Dumfries." The testator held only a leasehold interest in said property. Nearly a year before his death, the care and management of said school was transferred from the Magistrates and Town Council, and vested in the School Board for the Burgh by Act of Parliament. This transfer was without condition and

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absolute, and said School Board, with reference to all powers and duties in regard to said school then vested in the Town Council and Magistrates, was made to *supersede and come in the place of* said Town Council and Magistrates. The said School Board was by said Act duly incorporated, and the funds and revenues of said school were placed under its management. It was further provided by said Act, that "when in any Burgh, property or money *has been or shall be* vested in the Town Council, or in the Magistrates of any Burgh, or in any person or persons, *as trustees*, for the behoof of the Burgh School, or for the promotion of any branch of education in such school, or to increase the income of any teacher, the income or revenue of such property or money shall, as it accrues, *be accounted for and paid to the School Board*, of such Burgh, and shall be applied and administered *by the said Board* according to the trusts attaching thereto." And it was thereby further provided, that "it shall be lawful for the School Board, from time to time, with the sanction of the Board of Education, *to vary or depart from the said trusts* with a view to increase the efficiency of the Burgh Schools, by raising the standard of education therein or otherwise." **Held :**

- 1st. That at the time the will took effect, the Magistrates and Town Council, whom the testator made trustees of this fund, and charged with the duty of dispensing the income, had no power to pay over that income as the will directed, nor to exercise the *discretion* in its disposition which the will conferred upon them, and them alone.
- 2nd. That the substitution of the provisions of the Act of Parliament in place of what the will directed in this respect, would change what the testator must be assumed to have considered an essential and important part of it, and in effect make a new will for him.
- 3rd. That if the Act had not been passed, or had not taken effect until after his death this difficulty might not have arisen, but the question before the Court, must be determined by the state of facts and law existing when he died.
- 4th. That if the clause was not *then* effective the rights of the residuary legatees or next-of-kin vested immediately and irrevocably.
- 5th. That it may be, that the difficulty would be overcome in England by the provisions of the statute, 43 Elizabeth, ch. 4, respecting charitable uses, or by virtue of the powers which the Courts of Chancery in that country possessed before and independently of that statute. But the case must be decided upon the doctrines of Maryland law as established by our own judicial decisions, and by these neither that statute nor any such Chancery powers have ever been adopted as part of the law of this State, but have

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been uniformly denied and repudiated in every case in which an attempt has been made to have them recognized.

6th. That the difficulty above stated was insuperable and conclusive against the validity of said clause of the will.

7th. That as the decree below related to other matters which the appeal did not bring up for review, this Court must affirm that part of it only, which declared said clause of the will to be void.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., GRASON, MILLER and ALVEY, J.

*John V. L. Findlay and Charles E. Phelps*, for the appellant.

This being a novel case, no authorities directly in point can be adduced. But this is by no means surprising, in view of the fact that the States of Maryland and Virginia, and possibly one or two others, wherein the doctrine of charitable uses is rejected, are the only jurisdictions in which any question could be raised upon such a bequest. Nowhere else, either in England, Scotland or America, would any difficulty be found. 2 *Perry on Trusts*, sec. 748, note; 2 *Redfield on Wills*, 524, 541, notes; *Vidal vs. Girard's Ex'rs*, 2 *How.*, 127; *Whicker vs. Hume*, 7 *House of Lords*, 155; *Magistrates of Dundee vs. Morris*, 3 *Macqueen*, 153, 154.

While it is conceded that the doctrine of *Dashiell vs. Attorney General*, is too well settled to be shaken, (except as abridged and impaired by the Act of 1842, ch. 86, referred to below,) the question presented by this case is simply whether that doctrine is now to be inflated by the mere breath of the Court, and enlarged beyond all principle and precedent until it is made an arbitrary instru-

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ment for breaking wills, which can be readily carried into effect in accordance with the manifest general intent.

Here there can be no doubt as to the general intent. It is, that the income should be so applied to the use of the high school as best to "*promote the cause of education and elevate the standard of instruction*" therein.

The particular intent has reference only to the *special means*. *Simpers vs. Simpers*, 15 Md., 187; *Inglis vs. Trustees, &c.*, 3 Peters, 117, 118; *McDonogh's Ex'rs vs. Murdock*, 15 How., 367, 403, 404; *Powell on Devises*, 421; *Findlay vs. Riddle*, 3 Binn., 162; *Thelusson vs. Woodford*, 4 Ves., Jr., 329.

In such cases, the Courts say, there is no ground to suppose that the discretion of any particular trustee has anything to do with the essence of the gift. *Perry on Trusts*, sec. 731.

It is a general principle, applicable to all municipal corporations, that as organized governmental agencies for public purposes, they are always subject to legislative control. *Hagerstown vs. Sehner*, 37 Md., 180; *Baltimore vs. State, ex rel. Board of Police*, 15 Md., 376, 462. And a testator selecting such a corporation as a trustee, is presumed to have reference to the power of the Legislature to vary the particular mode of administering the trust. *Philadelphia vs. Fox*, 64 Pa., 182; 1 *Dillon Mun. Corp.*, secs. 37, 38; 2 *Dillon Mun. Corp.*, sec. 437.

If this bequest is declared void because the legislative power has created an agency for its enforcement not mentioned in the will, then no municipal corporation can hereafter safely be made the trustee of a public bounty, no matter how certain and definite its terms or objects. The mere *power* of the Legislature over the trustee, will be enough to set the bequest aside. The *exercise* of that power in the present instance, is only an illustration of what *may* be done in all cases. It is the *potentiality*, not the *accident*, that determines principle.



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Even in the event of legislative annihilation of the corporation, the trust would not be endangered, upon the common principle, "*which admits of no exception*," and therefore not peculiar to charitable uses, that *equity will not permit a trust to fail for want of a trustee*. *Sm. Man. Eq.*, 190, 191; *Peter vs. Beverly*, 10 *Peters*, 534, 565.

Such cases have actually occurred, and no difficulty has been found in providing a trustee in place of the municipal corporation disfranchised. *Montpelier vs. East Montpelier*, 29 *Vermont*, 12, 21, 22; *Harrison vs. Bridgeton*, 16 *Mass.*, 16; *Girard vs. Philadelphia*, 7 *Wall.*, 12, 13.

[Other points omitted as not adverted to by the Court.—REPORTER.]

*Edward Otis Hinkley*, for the appellees.

MILLER, J., delivered the opinion of the Court.

The record in this case shows that Robert Daniel of the City of Baltimore, died in June, 1873, leaving a will, and the sole question for determination on this appeal is the validity or invalidity of the first clause of that will, which reads as follows:

"1st. I do hereby order and direct that the house and side lot where I now reside, situated on Hamilton Terrace, in the City of Baltimore, Nos. 239 and 241 N. Eutaw street, be sold by my executors hereinafter named, as soon after my death as they may deem expedient, and on such terms as they may think best; and I do hereby devise and bequeath the proceeds therefrom arising to the Magistrates and Town Council of the Royal Burgh of Dumfries, the county town of Dumfrieshire, Scotland, to be paid over to them by my executors aforesaid, together with such rents and profits of said property as may accrue up to the time of said sale, and which said executors shall collect; in trust and confidence nevertheless, to and for the uses, trusts and purposes following, that is to say, that they, the said

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Magistrates and Town Council, shall permanently invest said rents and profits and the proceeds of sale in Government stocks, or in other safe and profitable securities, and pay over the interest and dividends of such investments as they accrue and are received, to the High School of Dumfries, which is under their direction and care, either by increasing the salaries of teachers or providing scholarships, or in such manner as may seem best to said trustees, and most likely to promote the cause of education and elevate the standard of instruction in the said High School of Dumfries."

The bill avers, and the answer admits, the testator held only a leasehold interest in this property, and we must therefore treat the clause in question as a testamentary disposition of personal estate. The record further shows, that nearly a year before the testator's death, the care and management of this school was transferred from the Magistrates and Town Council and vested in the School Board for the Burgh, by Act of Parliament, (35 and 36 *Victoria*, ch. 62,) generally known as the Scotland Education Act. This transfer is without condition and absolute. The terms of section 24 of this statute are, "Every burgh school shall be *vested in and be under the management* of the School Board of the Burgh in which the same is situated from and after the election of such School Board, and the said School Board shall thereafter, with respect to school management and the election of teachers, and generally with respect to all powers and duties in regard to such schools now vested in the Town Council and Magistrates or other authorities in whom the school management and the election of schoolmasters and teachers is at present vested, *supersede and come in the place* of such Town Council and Magistrates, or other authorities." By other sections, these School Boards are duly incorporated, and the funds and revenues of such schools whether derived from public contribution or special endowment, are also

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placed under their management and control. Then by section 46, it is further provided, that "When in any burgh property or money *has been or shall be* vested in the Town Council, or in the Magistrates of any Burgh, or in any person or persons *as trustees* for the behoof of the Burgh School, or for the promotion of any branch of education in such school, or to increase the income of any teacher, the income or revenue of such property or money shall, as it accrues, *be accounted for and paid to the School Board* of such Burgh, and shall be applied and administered by *the said board* according to the trusts attaching thereto," and to this is added a provision that would be altogether beyond the scope of legislative power in this State if it interfered with vested rights, viz., "and it shall be lawful for the School Board from time to time with the sanction of the Board of Education, *to vary or depart from the said trusts*, with a view to increase the efficiency of the Burgh School by raising the standard of education therein or otherwise."

It thus appears that at the time this will took effect there was no High School answering the description which the testator has given, that is, there was no such school under the "direction and care" of the Magistrates and Town Council. But what is of more importance, the Magistrates and Town Council whom he made trustees of this fund, and charged with the duty of dispensing its income, had no power to pay over that income as the will directed, nor to exercise *the discretion* in its disposition which the will conferred upon them, and upon them alone. By this clause of his will, the testator constituted the Magistrates and Town Council for the time being of this Burgh and their successors in office, trustees of a permanent fund to be invested by them, and the income therefrom they were required to pay over to the High School which is under "their direction and care," and this payment is to be made by them to or for the benefit of that school,

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“either by increasing the salaries of teachers or providing scholarships, or in such manner *as may seem best to said trustees*, and most likely to promote the cause of education and elevate the standard of instruction in the said school.” What salaries shall be increased, and to what extent and of what teachers, what scholarships shall be provided, and who shall be benefited thereby, and in what other mode the cause of education shall be promoted, and the standard of instruction elevated by the disbursement of the income of this fund, are all matters which the testator confided solely to the judgment and discretion of the trustees whom he selected and appointed. But at his death, an Act of Parliament had deprived these trustees of all power over such disbursements, and had substituted in their place for the performance of this duty and the exercise of this discretion a different body corporate, composed of different individuals, elected in a different manner, and invested with more extensive powers. The vesting of this large discretion as to the distribution of his bounty, *in these trustees of his own choice*, is no immaterial or unimportant part of his will which a Court can say the testator *intended* might be changed, and may therefore be disregarded. So far from it, the substitution of the provisions of this Act of Parliament in place of what the will directs in this respect, would, in our judgment, change what we must assume the testator considered an essential and important part of it, and in effect, make a new will for him. If this Act had not been passed or had not taken effect until after his death, this difficulty might not have arisen, but the question before us must be determined upon the state of facts and law existing when he died. If this clause was not *then* effective, the rights of the residuary legatees or next-of-kin vested immediately and irrevocably. It may be that this difficulty would be overcome in England by the provisions of the Statute, 43 *Elizabeth*, ch. 4, respecting charitable uses, or by virtue of the powers which the Courts of Chan-

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cery in that country possessed before and independently of that statute. But must decide this case upon the doctrines of Maryland law as established by our own judicial decisions, and by these neither the statute nor any such chancery powers, have ever been adopted as part of the law of this State, but have been uniformly denied and repudiated in every case in which an attempt has been made to have them recognized. Regarding the difficulty we have thus stated as insuperable and conclusive against the validity of the clause in question, we rest our decision upon what we have said on that subject, and shall not consider any of the other objections that have been argued at bar.

As the decree below relates to other matters which this appeal does not bring up for review, we must affirm that part of it only which declares the first clause of this will to be void.

*Affirmed, and  
Cause remanded.*

(Decided 1st March, 1877.)

ROBINSON, J., dissented.

WILLIAM COLE vs. REBECCA V. HYNES and EMILY  
J. HYNES.

*Presumptions on Appeal—Jurisdiction of Justices of Peace where title to land is involved—How the question is to be presented—Bills of Exception—Action to recover purchase money for land.*

On appeal from a judgment rendered by a justice of the peace, a motion was made in the Court below for a reversal of the judgment, upon the ground that it appeared on the face of the cause of action on which the judgment was rendered, that the justice of the peace had no jurisdiction of said cause of action, inasmuch as the title to land was involved in said case. The Court below overruled the motion and affirmed the judgment of the justice of the peace. On appeal, it was HELD:

That as the cause of action did not appear in the record, this Court in its absence must presume, that the motion to reverse the judgment of the justice of the peace, was properly overruled by the Court below.

In this State bills of exception are not allowed in the trial of cases upon appeals from judgments rendered by justices of the peace. If a party to such a suit desires to raise the question of jurisdiction, he must do so before the justice, by filing the allegation verified by affidavit prescribed by the 33rd section of Art. 51 of the Code, or by plea or other proper proceeding when the case is in the Circuit Court upon appeal.

This Court is not at liberty to examine the bill of exceptions in the case for the purpose of discovering whether title to land was or was not involved in the case.

No appeal lies to this Court from the judgment of a Circuit Court affirming a judgment of the justice of the peace, unless it affirmatively appears from the record that the justice rendering the judgment, and the Court affirming it upon appeal were without jurisdiction in the case.

Where the cause of action before the justice of the peace, is a balance of the purchase money for land,—in order to oust the justice of jurisdiction of the case, it must appear affirmatively on the face of the proceedings that the defendant has not accepted a deed of the property, but that the contract is still executory.

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Cole vs. Hynes, et al.

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APPEAL from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER, ALVEY and ROBINSON, J.

*Joseph C. Boyd and Bernard Carter*, for the appellant.

By the 14th section of Article 51, Maryland Code, it is declared: "But no justice of the peace shall have jurisdiction in actions where the *title to land* is involved."

The very nature of the cause of action in this case, shows that the title to land is "involved."

The action is for the purchase money of land sold by the appellees to the appellant.

To sustain this action the plaintiff must show affirmatively that she has a good title to the land, and must show a tender of the deed. *Owings vs. Baldwin*, 8 Gill, 350, 355; *Lawrence vs. Dale*, 11 Vermont, 549; *Judson vs. Wass*, 11 Johnson, 525; *Wilde vs. Fort*, 4 Taunton, 334; *Luckett vs. Williamson*, 31 Missouri, 54; *Washington & Turner vs. Ogden*, 1 Black Sup. Ct., 450; 2 Taylor on *Ev.*, sec. 1070.

In the case of *Dietrich vs. Swartz*, 41 Md., 201—this Court has said in construing the 14th section of Article 51 of the Code, "that its effect is to deny jurisdiction to justices of the peace in actions of ejectment, trespass, *q. c. f.* and the like, where title to land is or may be necessarily and directly in issue." And in the case of *Randle vs. Sutton*, 43 Md., 64, cited by appellee, the Court says: "It must appear to the Court from the *nature of the action itself*, that it is a case in which the title to land is necessarily and directly in issue between the parties."

As we have above shown in an action of assumpsit for the purchase money of land, the title of the vendor is "directly and necessarily in issue." In what action, therefore is the title to land more directly involved?

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*Wm. S. Keech*, for the appellees.

There is really but one point involved in the case, and that is: Had the justice of the peace jurisdiction to try and decide the case originally? If so, this appeal must be dismissed, as it is well settled that there is no appeal to this Court from the decision and judgment of a Circuit Court, in case of an appeal to the Circuit Court from the decision of a justice of the peace, if the justice had jurisdiction to try the case originally. *Randle vs. Sutton*, 43 Md., 64.

The title to land was not involved in this suit, within the meaning of the 14th section of the 51st Article of the Code, as interpreted by this Court in the case of *Dietrich vs. Swartz*, 41 Md., 196, and in the case of *Randle vs. Sutton* above referred to.

GRASON, J., delivered the opinion of the Court.

This action was instituted before a justice of the peace in Baltimore County, and judgment was rendered in favor of the plaintiffs, and an appeal therefrom was taken to the Circuit Court of said county. A motion was then made by the defendant, for the reversal of the judgment upon the ground, as was alleged in the motion, that it appeared "on the face of the cause of action on which the judgment was rendered, that the justice of the peace rendering the same, had no jurisdiction of said cause of action, inasmuch as the title to land is involved in said case." The motion was overruled, and the trial proceeded, and after receiving the evidence set out in the bill of exceptions, the Judge of the Circuit Court affirmed the judgment from which the appeal was taken, and this appeal from the judgment of affirmance was brought to this Court.

Section 14 of Article 51 of the Code provides, that "no justice of the peace shall have jurisdiction in actions where the title to land is involved." This action, it is alleged,



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was brought to recover a balance of purchase money, due on a sale of land by the plaintiffs to the defendant, and that this appeared on the face of the cause of action filed in the case. The account or cause of action which was the foundation of the suit, is not contained in the record, and we are therefore without the proper means of knowing whether it shows upon its face, that the title to land was or was not involved in the suit, and, in its absence, we must presume that the motion to reverse the judgment of the justice of the peace was rightly overruled.

In this State, bills of exception are not allowed in the trials of cases upon appeals, from judgments rendered by justices of the peace. If a party to such a suit, desires to raise the question of jurisdiction, he must do so before the justice, by filing the allegation verified by affidavit, presented by the 33rd section of Article 51 of the Code, or by plea or other proper proceeding, when the case is in the Circuit Court upon appeal. Bills of exception not being allowed in such cases, we are not at liberty to examine the bill of exceptions in this case, for the purpose of discovering whether title to land was or was not involved in this case. No appeal lies to this Court from a judgment of a Circuit Court, affirming a judgment of the justice of the peace, unless it affirmatively appears from the record, that the justice rendering the judgment, and the Court affirming it upon appeal, were without jurisdiction of the case. *Mears vs. Remare*, 33 Md., 246; *Herzberg vs. Adams*, 39 Md., 309. It not so appearing in this case, this appeal must be dismissed.

*Appeal dismissed.*

(Decided 2nd March, 1877.)

ALVEY, J., dissented.

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## BY THE COURT.

Since the opinion of the Court was filed in this case, our attention has been called to the fact that, though the account on which the suit was brought had been omitted from the record, a certified copy of it with an agreement of counsel that it should be used as if contained in the record, was filed with the clerk. These papers were filed with the clerk, but were not handed to the Court with the record, and our attention was not called to them. But the decision of the Court would not have been changed even if the account had been contained in the record, although it shows that the claim was for a balance of purchase money of land sold to defendant.

Where suit is brought to recover the purchase money of land, and the contract of sale has not been performed by the execution and delivery of a deed, the plaintiff must allege and prove that he has good title to the land. 2 *Taylor's Ev.*, sec. 1070; *Ragan vs. Gaiher*, 11 *G. & J.*, 488; *Washington & Turner vs. Ogden*, 1 *Black's S. C. Reps.*, 458. But if the defendant has accepted a deed of the property, the law is otherwise, and to oust the justice of jurisdiction of the case, it must affirmatively appear on the face of the proceedings, that the defendant has not accepted a deed of the property, but that the contract is still executory. It does not so appear in this case, and therefore we see no cause for changing the decision of this Court, as reached in the opinion heretofore filed in the case. The matters contained in the bill of exceptions, as we have before said, are not properly before us.

MELVILLE C. BRITTAIN and AMELIA J. B. BRITTAIN,  
his Wife *vs.* QUEEN MAUD CARSON and VIRGINIA  
K. CARSON, by their Guardian S. ROWLAND CAR-  
SON.

*Construction of Will—Question as to whether certain legatees  
took per stirpes or per capita.*

The will of a testator contained the following clause: "It is my will that the rest, residue and remainder of my estate, together with all my right and interest in and to the estate and property of my deceased wife H. R. shall be equally divided between my said daughter A. J. B. and the children of V. C." The testator left surviving him, his daughter A. J. B. and two grandchildren, the children of his deceased daughter V. C. There was nothing to be gathered from the other parts of the will showing an intention on the part of the testator, that his grandchildren were to be regarded in the distribution of the residue of his estate as a class taking by representation.

**HELD:**

That the said legatees by force of the language used took equally, and that the distribution between them was to be *per capita*.

**APPEAL** from the Circuit Court of Baltimore City.

The bill in this case was filed by the executors of John W. Randolph, deceased, against the residuary legatees of their testator to obtain a construction of the residuary clause of his will. This appeal was taken from the decree of the Court below, (GILMOR, J.,) construing said clause in favor of the appellees.

The case is sufficiently stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER, and ALVEY, J.

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Brittain and Wife vs. Carson, et al.

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*Thomas W. Griffin* and *Wm. H. Cowan*, for the appellants.

*Wm. Rowland* and *James B. Groome*, for the appellees.

BRENT, J., delivered the opinion of the Court.

The object of the bill in this case is to obtain a decree, construing the residuary clause of the will of John W. Randolph, which was admitted to probat in the office of the Register of Wills for Baltimore City, on the 6th day of May, 1874. The will is made an exhibit, and the clause in question, is as follows:

“It is my will, that the rest, residue and remainder of my said estate, together with all my right and interest in and to the estate and property of my deceased wife, Hannah Randolph, shall be equally divided between my said daughter, Amelia J. Brittain, and the children of Virginia Carson.”

At the time of the death of the testator in the spring of 1874, he left surviving him, his daughter, Amelia J. Brittain, and his two grandchildren, Queen Maud Carson and Virginia Randolph Carson, children of his daughter, Virginia Carson, who had died in May, 1873. The question now presented, is whether the surviving daughter, and the two children of Virginia Carson, take *per stirpes* or *per capita*.

The other parts of the will do not furnish any aid in determining this question. Legacies and devises are made to a number of legatees, and amongst them, to the parties named in the residuary clause. But there is nothing to be gathered from them, showing an intention on the part of the testator, that his grandchildren were to be regarded in the distribution of the residue of his estate as a class, taking by representation. If such an intention was apparent, the cases all concur that it must be carried out. The distribution to be made in this case, will therefore depend

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upon the construction to be given to the language used in the clause referred to.

The words of the will are, "shall be *equally divided* between my said daughter, Amelia J. Brittain, and the children of Virginia Carson." A long series of uniform decisions has given a settled construction to provisions in a will similar to this, all holding that the legatees, by force of the language used, take equally, and that the distribution is to be *per capita*.

The cases which have been referred to by the appellant, as establishing a different doctrine, all affirm and recognize this rule of construction, but are put as exceptions to it, because of something in the will which indicated a different intention on the part of the testator. Such is not the case here. In this will, the clause now in question, is unexplained and uncontrolled by any other portion of the will, and we are left to give it a construction solely upon the force of the words which the testator has chosen to employ. We have seen no authority, and do not suppose any case can be found, in which similar words have been construed to direct a distribution *per stirpes*.

There are numerous cases, both English and American, where the language of the will in question was similar to the one before us, and in all of them the now well settled rule of construction is adopted, and distribution directed to be made *per capita*. We shall only refer to some of them. In *Blackler vs. Webb and others*, 2 Peere Williams, 383, where the testator bequeathed the residue of his personal estate equally to his son James, and to his son Peter's children, &c.; the Lord Chancellor decreed that they took *per capita*, and not *per stirpes*. So in *Lenden vs. Blackmore*, 10 Simon, 626, where the testatrix directed the residue of her property, "to be *equally divided*" between Sybilla and Mary, daughters of her sister Elizabeth Sayer, and Elizabeth, daughter of her sister Susannah May, and her children; it was decreed that they took *per capita*, and

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not *per stirpes*. And so also in the cases of *Abrey vs. Newman*, 16 Beav., 431, and *Tyndale vs. Wilkinson*, 23 Beav., 74. The American cases are to the same effect. See *Conner, Adm'r, and others vs. Johnson, Adm'r, and others*, 2 Hill Ch. R., 43; *Farmer vs. Kimball*, 46 N. H., 439; *Stowe vs. Ward and others*, 3 Hawks, 605.

In this State, the rule of construction is also well settled. In the early case of *Maddox vs. The State*, 4 H. & J., 539, where the testator directed the residue of his estate, "to be *equally divided* between his brother Justinian, and his brother George's children," the Court held they took as tenants in common, and that distribution was to be made *per capita*, and not *per stirpes*. The language in this will is most strikingly similar to that in the will before us, and it might have been sufficient to have referred to that case as deciding the question involved in this.

This case has been followed and adopted by the subsequent decisions in this State. *Brown vs. Ramsey*, 7 G., 347; *Thompson vs. Young*, 25 Md., 461; *Benson vs. Wright*, 4 Md. Ch. Decs., 278. The cases of *Alder and others vs. Beall*, 11 G. & J., 123; and *Levering and others vs. Levering*, 14 Md., 38, where the distribution was directed to be *per stirpes*, are manifestly, as will be found other similar decisions, cases in which it was apparent from the will itself, that the testator so intended the distribution to be made. They are in this respect readily distinguished from the present one.

It follows from what we have said, that we concur with the Judge of the Circuit Court of Baltimore City, that the distribution in this case must be *per capita*.

The decree of that Court will therefore be affirmed.

*Decree affirmed.*

(Decided 2nd March, 1877.)

STATE, use of MICHAEL FALLON vs. GEORGE L. LAYMAN, and others.

*Question as to who is the real plaintiff in an action upon a sheriff's bond—Rule security for costs—Presumptions on appeal.*

In an action on a sheriff's bond brought in the name of the State, for the use of the real claimant, it was HELD:

- 1st. That the State in such form of action permits its name to be used by the party beneficially interested, but is in no event answerable for any part of the costs.
- 2nd. That the party for whose use the suit is instituted, is the plaintiff within the spirit and meaning of sections 8 and 10 of Art. 27 of the Code.
- 3rd. That if he is a non-resident of the State, there can be no doubt of the Court to lay the rule requiring him to give security for the payment of the costs, as provided in sec. 10 of said Article.
- 4th. That on appeal from the refusal of the Court below to strike out a rule "security for costs," after the rule had been made absolute, all the presumptions are that the Court acted upon sufficient proof in laying the absolute rule, and the motion to strike out, imposed upon the appellant the necessity of showing affirmatively the contrary.

APPEAL from the Circuit Court for Allegany County.

This suit was brought by the State of Maryland, for the use of Michael Fallon, against the appellees, on a sheriff's bond. The record of the proceedings subsequent to the declaration is as follows:

1875, Oct. 11th.—Motion by defendants for rule security for costs.

1875, Nov. 10th.—Rule security for costs and case continued.

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State, use of Fallou *vs.* Layman, *et al.*

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1876, Jany. 4th.—Motion to strike out rule security for costs.

1876, January 6th.—Reasons filed in the words following, to wit:

STATE, use FALLON, vs. LAYMAN, <i>et al.</i>	}	No. 27, Trials.—January Term, 1876.
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The plaintiff in this cause moves the Court to strike out the rule security for costs in this case, for the following reasons, viz.,

1st. Because the entry thereof was made improvidently and without proper foundation being laid.

2nd. Because the said Fallon whose non-residency is alleged as ground for said rule, is only the equitable plaintiff, and the legal plaintiff being the State of Maryland, no security for costs can be required.

WM. BRACE, JR.,

*Atty. for plaintiff.*

1876, Jany. 6th.—Motion to strike out rule security for costs overruled, and judgment of *non pros.* on rule security for costs.

1876, June 6th.—Appeal prayed by plaintiff.

The cause was argued before BARTOL, C. J., STEWART, BOWIE, BRENT, GRASON and MILLER, J.

*Thomas Cook Hughey, Wm. Brace and Benj. A. Richmond*, for the appellant.

*A. H. Blackiston*, for the appellees.

BRENT, J., delivered the opinion of the Court.

When this case was first reached upon the docket, it was continued under the rule, but afterwards the continuance was struck out by consent, and the case submitted on the 21st of February.



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State, use of Fallon vs. Layman, et al.

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We shall dispose of it in a very few words.

The suit is brought on a sheriff's bond, in the name of the State, use of Michael Fallon, and a rule was laid upon the plaintiff, "security for costs."

It is contended, that the State being the legal plaintiff, it is not a case in which the defendant can demand the security. *Art. 27, sec. 10*, of the Code provides, that the defendant may have a rule on the plaintiff to give security for the payment of the costs and charges *which may be recovered against him* in such action, if the plaintiff is not a resident of the State. In a form of action like the present, the State permits its name to be used by the party beneficially interested, but is in no event answerable for any part of the costs. They are chargeable against the party for whose use the suit is instituted, and may be recovered against him. *Art. 27, sec. 8*. He is the plaintiff within the spirit and meaning of these sections of *Art. 27*, read together, and it is unimportant that he is but the equitable plaintiff. He is the party plaintiff chargeable with costs, and the language, as well as the spirit and intention of the law, embraces him. There can be no doubt, if he is a non-resident of the State, of the power of the Court to lay the rule. The practice of the Courts has given this construction to the law, and we think it is the correct one.

The next objection to the rule is, that it was improvidently laid, there being no proof offered of Fallon's being a non-resident of the State.

The motion in this case is to strike out the rule which had been made absolute. All the presumptions are, that the Court acted upon sufficient proof in laying the absolute rule for security, and the motion to strike out imposes upon the appellant the necessity of showing affirmatively the contrary. This he has not done, for there is no proof upon either side to be found in the record. This leaves the presumption in favor of the "*rite acta*" on the part

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of the Court, and such presumption is now conclusive upon us.

The judgment of the Court below will, for these reasons, be affirmed.

*Judgment affirmed.*

(Decided 2nd March, 1877.)

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J. H. HENRY MAENNER vs. JAMES CARROLL of  
CHARLES, and others.

*Questions arising in an action for damages sustained by falling into an excavation for a street, on a private lot over which the public were in the habit of passing—Right of way—License by implication—Nuisance—Dedication—Province of Court and Jury—Pleadings—Rejected prayers.*

In an action of damages for a personal injury, it was alleged in one of the counts, that the defendants were owners of a certain open and unenclosed lot of ground, within the limits of the City of Baltimore, and that persons were in the habit of passing over the same; and that the defendants cut on such lot in a dangerous and exposed portion thereof, a deep excavation, and left the same in a dangerous condition, and liable to injure persons passing over the said lot; and that the plaintiff while passing over said lot on a certain night, being ignorant of the excavation, fell therein and was injured. On demurrer, it was HELD:

- 1st. That said count entirely fails to state a sufficient cause of action.
- 2nd. That the fact that persons were in the habit of passing over the lot gave the plaintiff no right to do so; and unless there was such right, there was no breach of duty on the part of the defendants in cutting and leaving open the excavation.
- 3rd. That a party has the right to use his land as he pleases, except as he may be restrained by duty to the public or to private individuals.

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4th. That any individual who complains of the manner in which a defendant may have used his own land, should show with certainty and precision both the right of the plaintiff, and the duty of the defendant, and in what manner such right and duty have been violated.

5th. That having no right to be on the lot according to the facts alleged in the count, the injury which the plaintiff suffered by falling into the excavation must be attributed exclusively to his own fault.

In other counts of the declaration, after alleging that there was a *public highway* across said lot, it was further alleged,—not that the defendants cut the excavation, and left it in a condition dangerous to persons passing along the highway,—but that they *permitted* others to do so. On demurrer to these counts, it was **Held** :

1st. That said counts were defective in not stating definitely *how* the defendants “permitted” the act complained of.

2nd. That where there is want of certainty in the allegation of a pleading, the general rule is, that the sense of an averment is to be taken most strongly against the pleader.

3rd. That it did not follow, that because the defendants were the owners of the lot, they were liable for all the nuisances that may be created thereon, no matter by whom.

In another count it was alleged that the defendants were the owners of a certain lot of ground, over which for many years they had *permitted all persons* to cross and recross at pleasure, without hindrance or interruption; and that under and by virtue of this *permission, leave and license*, the public generally were in the habit of crossing and recrossing said lot at pleasure, and that the defendants, with the knowledge of this general user by the public, and without notice or warning, and without revoking the permission or license, cut a deep trench through said lot and across the usual road or pathway, on which persons were in the habit of crossing said lot, and left open and unguarded said trench or excavation, &c. On demurrer, it was **Held** :

1st. That there was nothing here alleged to constitute a public nuisance.

2nd. That the allegation that the defendants permitted all persons to cross and recross the lot at pleasure, without let, hindrance or interruption, and that the public generally were in the habit of so crossing and recrossing the same, under and by virtue of said permission, leave and license, was not sufficient to show in the plaintiff a positive right, and without such right the action could not be maintained.

3rd. That there was no doubt however of the general proposition, that an obstruction or excavation made on a party's own land, and lawfully made, may give rise to an action upon proof that such obstruction or excavation was concealed, and the plaintiff was invited or induced by the act or conduct of the defendant, to pass over or near such obstruction in ignorance of its existence, whereby injury resulted.

At the trial it was proved that a contractor for grading, curbing and paving streets, made the excavation in question, under a contract with the defendants, for making the excavations in Cole street, which crossed the premises of the defendants; but there was no evidence that any of the defendants ever exercised any control or supervision over the work, except as they were owners of the lot, and had contracted with a competent workman to grade the street, as laid out and defined on the city map, according to the gradient established by the municipal authorities. **Held :**

1st. That the contracting for the work was a lawful act, and the making of the excavation, which was necessary in the execution of the work, was equally so; and in order to render the defendants liable, there must be shown a breach of duty by them to the plaintiff in respect to some right of his to pass and repass over the lot.

2nd. That the question of the existence of a public highway or thoroughfare, having been settled by the jury adversely to the plaintiff, even if it be conceded that people were in the habit of passing over the lot without hindrance or objection from the defendants, the presumption would be in the absence of authority for such user, that they were trespassers.

3rd. If, however, it could be concluded from the evidence, that there was an implied license to the plaintiff to pass and repass over the lot at pleasure, until such license was revoked by some positive act or declaration of the defendants, such license or permission conferred no such right upon the plaintiff as to enable him to sue the defendants for obstructing the way, unless there was some concealed trap or excavation made in the way, which the plaintiff could not have discovered by the use of ordinary and proper diligence while in the use of the license.

The jury are not the tribunal to determine what would constitute a legal dedication of a way to public use. They are competent to find the existence of facts to fulfil the definition of what would constitute such a dedication, but not to determine the definition itself.

The jury have nothing to do with rejected prayers, and counsel should not be allowed to refer to them for the purpose of influencing the conclusions of the jury in regard to the facts before them.

APPEAL from the Superior Court of Baltimore City.

The case is sufficiently stated in the opinion of the Court.

*First Exception.*—After the testimony had closed, the plaintiff offered the following thirteen prayers.

1. If the jury shall find from the evidence, that the defendants were, on the 14th day of May, 1875, and for a long time theretofore had been, the owners of the lot or tract of land mentioned in the — counts of the declaration in this cause, and shall further find that there was over and across said lot or parcel of land, a certain roadway leading from Ramsey and Fulton streets to Baltimore and Ohio Railroad, at a point at or near the Mount Clare station, or to the Washington road, which had been used by the public a period of more than twenty years prior to May 14th, 1874, under a claim of right to use the same, and that said user of said roadway had been generally peaceable, uninterrupted and adverse during the whole of said period, and shall further find that the defendants cut, or caused to be cut, over or across said roadway, a deep trench or excavation, and left the same in an unprotected and unguarded condition, without any warning or notice to the public of danger in passing over said roadway; and shall further find that the plaintiff, on the night of the 14th of May, 1874, while passing over said roadway and exercising ordinary care, fell into said trench or excavation and was injured thereby, then the plaintiff is entitled to recover in this action.

2. If the jury shall believe from the evidence, that the defendants were, on the 14th day of May, 1874, and for a long time theretofore had been, the owners of the lot or tract of land mentioned in the — count of the declaration in this cause. And shall further find that there was a roadway across said lot or parcel of ground, which had been used by the public generally for a long time, and that the defendants were aware of such user, acquiesced in the same, and that on

the line of said roadway there was a bridge over a depression in the same road, for the purpose of allowing foot passengers, persons on horseback and vehicles to pass over said depression, and that said roadway passed over a railroad track, and when it crossed said railroad track a space was left open between the cars, wide enough and for the purpose of allowing all persons and vehicles desiring to pass over the same, to cross said railroad track, and further that there was at said place of crossing said railroad track, (if they shall find there was such a place,) a notice put up, warning such persons to "Beware of Locomotives," and that a flagman was placed at such crossing, (if there was one,) to warn all such persons against danger in crossing said railroad track, then they are at liberty to find a dedication of the said roadway by the defendants as a public highway, and shall further find that the defendants cut, or caused to be cut, over said lot and across said roadway, a deep trench or excavation, dangerous and liable to injure persons desiring to pass and repass over said roadway. And shall find further that the plaintiff, on the night of the 14th of May, 1874, while passing over said roadway, without warning, or knowledge, or notice of said excavation, and without any guard or protection to keep persons passing as aforesaid over said roadway, from falling into the same, while in the exercise of due care, fell into said excavation and was injured thereby, then the plaintiff is entitled to recover in this action, even if they should find that said excavation was cut across said roadway by an independent contractor, provided they further find that said contractor so cut the same across said roadway, under a contract with the defendants, and that in so cutting it, he did no act in contravention of the terms of the said contract.

3. If the jury believe from the evidence, that the defendants were, on the 14th of May, 1874, and for a long time theretofore had been, the owners of the lot or parcel of

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ground, mentioned in the different counts in the declaration in this cause, and shall find that there was over and across said lot a roadway, which had been in general use by the public for a long period of time, with the acquiescence of defendants, and that said roadway was the usual and only safe approach on the north side to the Western Schuetzen Park, a place of public entertainment, and shall further find that the defendants cut, or caused to be cut, on said lot and across said roadway, a deep excavation or trench, and left the same open and unenclosed, without warning or notice to the public of its dangerous character, and further that the plaintiff, on the night of the 14th of May, 1874, while passing over said roadway, and while ignorant of said excavation, and in the exercise of ordinary care, fell into said excavation or trench and was injured, then the plaintiff is entitled to recover in this action.

4. If the jury believe from the evidence, that the defendants were, on the 14th of May, 1874, the owners of the lot or parcel of ground mentioned in the different counts of the declaration in this cause, and that there was running across said lot, from the south end of Fulton street in Baltimore City, a roadway in general use by the public, and which had been in such general use for more than twenty years, leading up to a house which had been used for a long time as a place of public entertainment, and that said road was the regular and only safe approach to said house, for all persons coming from the direction of Fulton street, and shall further find that the defendants, or an independent contractor employed by them for that purpose, cut over said lot and across said roadway a deep trench or excavation, thereby rendering said roadway dangerous and impassable to those desiring to pass over the same, and shall further find that the plaintiff, while passing over said roadway, exercising ordinary care, and in returning from said house, to which he had been on

business, or as member of the club occupying said house, if they find he had been to said house on business, or as such member of a club occupying said house, when returning therefrom, without warning, notice or protection of any kind against accidents, fell into said excavation, and was injured thereby, then the plaintiff is entitled to recover in this cause.

5. If the jury believe the matters and things set forth in the first prayer, and shall further find that the excavation spoken of had been cut across the road or pathway in said prayer specified, for two or three weeks previously, and that the said excavation was dangerous, and likely to injure those persons desiring to pass and repass over the same, and that the defendant took no pains to guard or protect the same, so as to prevent injury to those likely to pass and repass over the same, and that the plaintiff while passing over said road, without warning or notice, and while using due care, fell into said excavation and was injured, then the plaintiff is entitled to recover, whether said excavation was made by an independent contractor, or by the defendants themselves.

6. If the jury shall believe from the evidence in the cause, that the defendants were, on the 14th day of May, 1874, and for a long time theretofore had been, the owners of the lot or parcel of ground mentioned in the — count of the declaration in this cause, and shall further find that there was a regular fixed roadway or path over and across said lot or parcel of ground, and that the said road had been dedicated to public use; and if they shall further find that the defendants dug, or caused to be dug over said lot and across said highway, a deep trench or excavation, dangerous to persons passing over the same, and that the plaintiff, on the night of the 14th of May, 1874, while passing over said highway, without any notice or warning or guard to protect persons passing over the same, and while exercising ordinary care, fell into said trench or



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excavation, and was injured, then the plaintiff is entitled to recover, regardless of the question of whether said roadway was across an inclosed lot or not.

7. If the jury believe from the evidence, that the defendants were the owners of the tract, or parcel of land mentioned in the ninth count of the declaration in this cause, and if they further believe that over and across the said lot or tract of land all persons desiring so to do were permitted, without hindrance from the defendants, or any of them, to pass and repass at pleasure, upon a certain pathway or road, and that all such persons were, for a long time, in the habit of passing and repassing with safety over the same, on foot, on horseback, or in vehicles of different kinds, with the acquiescence of the defendants, and shall further find that defendants, with notice of the fact that persons were likely to cross and recross the same, in and upon the path or road leading across the same, between Mount and Fulton streets, and without any effort to warn such persons of danger in so crossing, and without taking any measure to guard against accident to such persons so crossing and recrossing the same, did cut a deep trench or excavation over said parcel or tract of land, and across said pathway or road, rendering the crossing of said lot or parcel of land in the usual place or places of crossing the same, dangerous to persons likely to cross over said lot or parcel of ground, and likely to approach said trench or excavation, and shall further find that the defendants did not forbid persons from passing and repassing across said lot or parcel of ground; and if they shall further find that the defendants were indifferent to the injuries which might happen to such persons passing and repassing over said lot or parcel of ground by reason of cutting such trench or excavation, and shall further find that the plaintiff, on the night of the 14th of May, 1874, without notice or knowledge that the said excavation or trench was cut across the pathway or road

usually travelled by persons passing from the corner of Fulton and Ramsey streets, over said lot to Baltimore and Ohio Railroad, and while exercising ordinary care in passing over the same, fell into said trench or excavation, and was injured thereby, then they may find for the plaintiff, notwithstanding that they may find that said lot or parcel of ground was unenclosed, and that there was more than one pathway or road across said lot, and their said finding shall not be affected by their finding that said trench or excavation was cut by an independent contractor, if they shall further find that said contractor was employed by the defendants to cut the same, and did only what he was employed to do by the said defendants.

8. If the jury shall find from the evidence, that the defendants, and those under whom they claim, owned the lot of ground mentioned in the ninth count of the case, and for twenty years prior to the 14th May, 1874, the said lot was unenclosed, and there were one or more road tracks and pathways for vehicles and foot passengers crossing the same, and converging at the Baltimore and Ohio Railroad track, in and upon which all persons so desiring had, during all that time, been in the habit of using and travelling, in going to and from the said railroad track, without any interference, let, hindrance or objection from the said defendants, or those under whom they claim, and by their acquiescence and permission, may be inferred from such long uninterrupted use in passing to and fro across the same, without any objection upon the part of the defendants, or those under whom they claim; and shall further find that the said license, if they shall find the same was not revoked by the defendants prior to said date, and no notice given to the public, and especially to the plaintiff, that the surface of the lot aforesaid, was about to be rendered impassable for vehicles and dangerous for foot passengers, by cutting a street through the same, and further

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find that the defendants themselves, or by their servants and agents, cut a deep and wide trench across the point on the said lot crossed by said roads and paths, rendering the passage across the said lot impassable for vehicles, and dangerous to those who might pass over the same, without notice or knowledge thereof, and further find that defendants had good reason to expect that persons would cross the said lot at said points by said road and paths, and took no means to warn such persons of the danger caused by said cut, or to prevent such persons from being injured by the said change made in the surface of said lot, and shall further find that on the night of the 14th of May, 1874, when it was dark, the plaintiff, in ignorance of the fact that the said trench had been cut across the said roads and paths, and pursuing the ordinary way of crossing said lot under said license, and with ordinary care, did fall into said trench, and was thereby injured, then the jury may find for the plaintiff.

9. If the jury find from the evidence that the defendant permitted the plaintiff, in common with the public generally, to enter upon and pass over their lot of ground mentioned in the ninth count of the *narr.*, and in the evidence, for a long time before the year 1874, and to use such ways or tracks across the same as they might then find had been in use, and which they might desire to travel, in order to go to and from points on the north and south of the said lot, and never notified him or the public to desist from so travelling over the same, and the plaintiff and the public generally, in pursuance of such permission for many years prior to 1874, had been in the habit of crossing the said lot on foot, and with horses and vehicles, and driving cattle and hogs across the same, upon such roads or paths as they might then find had been used, running from Ramsey street towards and to the Baltimore and Ohio Railroad track and West Baltimore Schuetzen Park, if they shall find any such roads existed and had been in

use, and shall further find, that the defendants, without giving any notice of their intention to change the surface of said lot and render the travel across it in the said accustomed places, (if they find there were such accustomed places,) impracticable and dangerous, and with good reason to believe that persons who had been in the habit of crossing said lot as aforesaid, would be likely to continue to cross the same, unless warned of the danger of so doing, did cut a trench across the said lot and said accustomed road and paths, if they find any such roads and paths, — feet wide, and from nine to ten feet deep, on such part and in such position upon said lot as to be visible to persons crossing the lot on said roads only when in very close proximity to the same, in consequence of the physical formation of the lot, and equally dangerous along the whole extent of the cut aforesaid, and placed no guard to protect such persons from falling into the same, or any lights to enable such persons on dark nights to observe the dangerous excavation and avoid it, and the plaintiff in crossing the said lot on his way from the said park to the Frederick road on business, upon the night of the 14th of May, 1874, whilst walking across the said lot on one of the crossing places usually used by those crossing the same, and exercising ordinary care and ignorant of the existence of the said trench, fell into the same and was injured, then their verdict may be for the plaintiff, though they find that the said lot was unenclosed, and that there is no other evidence of said permission of defendants to cross the said lot except passive acquiescence upon the part of the defendants.

10. If they shall find from the evidence, that plaintiff had a license from the defendants to cross the lot mentioned in the pleadings, and that defendants were owners thereof, and without revoking said license or giving any notice or warning to plaintiff, either actual or constructive, of their intention to cut a trench across the said lot, and

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across the usual place of passing the same by the plaintiff under said license, and with good reason to believe that the plaintiff would pass as usual unless warned of the change that had been made in the surface of the lot, and without any guard to protect him and others from falling into the same, and the plaintiff whilst crossing said lot in pursuance of said license, and in the usual place for crossing, and whilst exercising ordinary care, fell into said excavation and was injured, then they may find for the plaintiff, though they find the lot was unenclosed, and that the defendants had the right to cut the trench across the said lot.

11. The fact that the excavation spoken of in all of the preceding prayers of the plaintiff, was cut by an independent contractor employed by the defendants, (if the jury find it was so cut,) cannot affect the plaintiff's right to recover in this action unless the jury find that said contractor in cutting the same, was not doing what he was employed by the defendants to do, but that said cutting was in violation of his contract.

12. In estimating the damages to which the plaintiff is entitled in this cause, the jury are at liberty to take into consideration all the circumstances of the case, the effect upon the plaintiff's business, his mental and bodily suffering, the permanent character of his injury, if they find that his business was affected by said accident, that he did suffer mental and bodily pain therefrom, and that his injury was of a permanent character.

13. If the jury believe that the defendants were guilty of wanton and reckless negligence in cutting the excavation mentioned in the preceding prayers, then in addition to the compensation for actual pecuniary loss, mental and bodily suffering, and the permanent character of the plaintiff's injury, they are at liberty to impose upon the defendants punitive or exemplary damages in their discretion.

And the defendants offered the eight following prayers :

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1. That there is no sufficient evidence in the cause of negligence on the part of the defendants, to entitle the plaintiff to recover for the injuries complained of in the declaration.

2. That there is no sufficient evidence in the cause of a public highway across the lands of the defendants, as alleged in the plaintiff's declaration.

3. That the jury shall find from the evidence, that the plaintiff, by the exercise of ordinary care, might have avoided falling into the excavation in evidence, that then the plaintiff is not entitled to recover.

4. That if the jury shall find from the evidence, that the plaintiff received the injuries complained of in the declaration, by falling into an excavation; and shall further find that said excavation was made on the property of the defendants, and that there was no public highway or foot-path at the spot where said accident occurred or immediately contiguous thereto, that then the plaintiff is not entitled to recover.

5. That if the jury shall find that the plat testified to by Simon J. Martenet, correctly delineates the streets of Baltimore City, as laid out by Commissioners under the Act of Assembly of the State of Maryland, in the year 1817, chapter 148, section 12, as shown by Poppleton's Plat, and if they further find that Fulton street, as shown on said plat, was graded, paved and curbed to the building line of Cole street in 1854, and that Ramsey street, between Fulton and Mount streets, was graded, paved and curbed in 1857, and that the lot of ground bounded on the west by Fulton street, on the north by Ramsey street, on the east by Mount street, and extending south beyond Cole street, was, in 1873, and for a long time before, an open vacant common, owned by the defendants, and that the grade of Cole street had been established by the official authorities of Baltimore City, and that defendants, desiring to improve said property, made the contract with

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Francis Hay, in evidence, dated 4th day of November, 1873; and if they further find that said Hay was a competent and skillful person, and that said Hay, under said contract, in November, 1873, ploughed up the entire surface of the bed of Cole street, between Mount and Fulton streets, and that said Hay proceeded to make the excavations necessary to grade said Cole street, according to the grade so established by the city authorities, and that in May, 1874, whilst said Hay was still performing said contract, the plaintiff, while crossing the said lot upon his own business, or for his own pleasure, fell into the excavation so made by said Hay, and was injured thereby, that then the defendants are not liable for said injuries.

6. That to constitute a public highway by prescription, it is necessary to show an adverse, continuous and exclusive use by the public for twenty years; and even if the jury find that the public were in the habit of passing over the land of the defendants, in going from the Frederick road to the Washington road, yet if the jury believe this use was exercised by permission of the owners, or if the passage was interrupted by any obstruction incumbent with the use of it as a public highway within twenty years then such use by the public cannot make said road a public highway.

7. That there is no evidence in the case of any public highway across said land of the defendants by dedication.

8. That there is no evidence in the cause, that the defendants either directly or by implication, induced the plaintiff to enter upon or pass over their land, in said declaration described, and therefore the plaintiff is not entitled to recover under the ninth and tenth counts of the declaration.

The Court, (GAREY, J.,) granted the first, fifth, eleventh and twelfth prayers of the plaintiff, and the third, fourth, sixth, seventh and eighth prayers of the defendants, but refused to grant the second, third, fourth, sixth, seventh,

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eighth, ninth, tenth, and thirteenth prayers of the plaintiff. The plaintiff excepted.

*Second Exception.*—Stated in the opinion of the Court.

The jury rendered a verdict for the defendant, and judgment was entered accordingly. The plaintiff appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, GRASON, MILLER and ALVEY, J.

*Henry C. Kennard and John H. Handy*, for the appellant.

An implied license may arise in various ways—as when a man opens a road to his dwelling, there is an implied license for persons to go by that road to his dwelling for any legitimate purpose; or in case of ways of necessity, when a man sells a piece of land, entirely surrounded by other land, there is an implied license to the purchaser to pass over this other land to get to his purchase; so, where there is a road-way in regular use by the public over a man's land, and such user is, and has, for a long time been uninterrupted, there is an implied license to the public to pass over it. 1 *Addison on Torts*, (Wood's Ed.,) sec. 229; 2 *Waterman on Trespass*, pp. 94–5–6, 182–3, (sec. 781–2,) pp. 207–8, and notes at bottom of last two pages; *Corby vs. Hill*, 4 C. B., (N. S.,) 556; *Gallagher vs. Humphrey*, 10 W. R., 664, (6 Law T. R. N. S., 684;) *Shearman & Redfield on Neg.*, sec. 498.

It is conceded that a licensor is not bound to keep a way in good repair for a licensee. But, it is equally clear, he has no right to render the way dangerous, without notice to the licensee. In this case the averment is distinct, that they did render the way very much more dangerous, whilst they neither revoked the license nor notified the licensee, nor took any precaution to avert the results of their act. The licensee is lulled into a fancied security, by the fact, that the license is not revoked.



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Notice is necessary to an implied licensee. 2 *Waterman on Tres.*, p. 183, sec. 781; *Shearman & Red. on Neg.*, sec. 499.

And notice is necessary, even as against a trespasser. *Shearman & Red. on Neg.*, 43, n. 38, and cases cited; *Ibid*, secs. 499, 508, 509, 510; 1 *Waterman on Trespass*, pp. 90, 145, 146, sec. 166; 1 *Addison on Torts*, (*Wood's Edition*,) sec. 229; *Daley vs. Nor. R. R. Co.*, 26 Conn., 591; *Birge vs. Gardiner*, 19 Conn., 507; *Brown vs. Lynn*, 31 Pa. St., 510; *Loomis vs. Terry*, 17 Wend., 496; *Sawyer vs. Jackson*, 5 N. Y. Leg. Obs., 380; *Bird vs. Holbrook*, 4 Bingham, 628, (15 E. C. L., 91;) *Lynch vs. Nurdin*, 1 Adolp. & Ellis, N. S., 29, (41 E. C. L., 422;) *R. R. Co. vs. Stout*, 17 Wallace, 657; *Davies vs. Mann*, 10 Mees. & Wels., 548; *State vs. Moore*, 31 Conn., 479; *Robinson vs. Cone*, 22 Vermt., 213; *Caswell vs. Worth*, 5 E. & B., 85 (E. C. L., 848.)

While it is decided that traps, spring-guns, and other dangerous instruments, may be lawfully placed on private grounds, for the purpose of deterring trespassers or catching strange animals doing damage, yet, one who uses such instruments, must give public notice of the fact, in such way, as to bring it to the knowledge of *every one* who uses reasonable care in approaching the land. And this applies with such force, that *it is decided unlawful to place them upon land not fenced in*. And in the *absence of proper notice*, the owner is liable even *to a trespasser*. And the same doctrine is equally applicable to dangerous excavations as to dangerous instruments, the true principle being that no man has a right recklessly to endanger human life. *Shearman & Redfield on Negligence*, p. 571, sec. 509.

A person who is the owner or occupant of real property, and quietly acquiesces in its use by others, while under no obligation to keep it fit for such use, is responsible for any injuries which may happen to those so using it, by reason

of any increased danger resulting from the acts of such owner or occupant. The same principle which makes the owner responsible for excavations too close to the public highway, applies to all cases where a party has good reason to believe that injury may happen to others from his acts, viz., that in all such cases he must give notice or warning, must exercise proper precautions to prevent such injury. And if injury should happen from his neglect to give such notice or exercise such precautions, he is liable to the party so injured, and it is no reply to an action by the injured party to say that he was a trespasser. *Shearman & Redfield on Neg.*, secs. 499-500-503; *Sweeny vs. Old Colony R. Co.*, 10 *Allen*, 368; *Zoebisich vs. Tarbell*, 10 *Allen*, 385.

*J. Alexander Preston* and *R. J. Gittings*, for the defendants.

To charge the owner of waste or vacant land with an obligation to protect those who may think proper to pass over it against an excavation made under his authority, it is not enough to show that all persons having occasion to cross such waste land have been accustomed to go upon and across the same without interruption from the owners, and with their license and permission. *Hounsell vs. Smyth*, 7 *C. B.*, *N. S.*, 731; *Gautrat vs. Egerton*, *L. R.*, 2 *C. P.*, 371; *Bolch vs. Smith*, 7 *H. & N.*, 736; *Smith vs. Loudon & St. Katharine Docks Co.*, *L. R.*, 3 *C. P.*, 332, 333, 334; *Indermaur vs. Dames*, *L. R.*, 1 *C. P.*, 287, 288, *L. R.*, 2 *C. P.*, 312; *Stone vs. Jackson*, 32 *Eng. Law & Eq.*, 349; *Kohn vs. Lovett*, 44 *Ga.*, 251; *Howland vs. Vincent*, 10 *Met.*, 371; *Knight vs. Abert*, 6 *Penn. St.*, 472; *Hardcastle vs. So. Yorks Ry. Co.*, 4 *Hy. N.*, 67; *Whart. Negligence*, secs. 351, 824, note.

Such sufferance and tolerance, or even express permission of passage over vacant land, may preclude the owner from treating those who have availed of it as trespassers,

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but raise no *duty* to guard them against the consequences of so availing of it, nor do they limit his right as owner to make any lawful use of his property. Were the law otherwise, the owners of open lands never could be safe in using it. The same man who in the dark walks into a pit excavated in its midst, might have sustained equal injury by stumbling against a farmer's harrow, or a plough standing in the furrow. To sustain an action like this, it is therefore necessary to go further, and show facts which made it legally obligatory upon the owner to fence off the excavation.

Here the excavation of the street-bed was not only lawful, but reasonably to be expected. The condition of the property necessarily required that it should be done at some time, and it is not denied that the proper time had, in fact, arrived.

A duty to fence an excavation may arise from the fact that the excavation is immediately adjacent to a public highway, so as to make the ordinary use of the highway dangerous. It may also arise from an invitation or allurement held out by the owner, as where he is a tradesman, mechanic or innkeeper, and the common access to his shop or inn, is over the route which the excavation, subsequently made, obstructs or renders insecure. Under some circumstances, the holding out of a path even to a private dwelling, may impose an obligation upon the owner against those lawfully visiting him, and invited to take the path so visibly indicated and held out. It is needless to say that no such special circumstances exist, or are alleged to exist here. This is the simple case of a piece of land left open and unfenced in a city, and surrounded by paved streets, constituting the only proper highways of the city,

It is clear, therefore, that the third, fourth, fifth, sixth, seventh and eighth counts, which allege no legal duty which has been violated, do not set forth any cause of action, and the demurrers were properly sustained.

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There was no evidence legally sufficient to show a public way by dedication along the course taken by the plaintiff.

The instructions given to the jury, as to the existence of a public highway at the place in question, were even more favorable to the plaintiff than he was entitled to. The Court might well have held that there was no evidence at all of such a highway as was claimed, but the question whether or not a public way did exist there, was left to the jury by the granting of the plaintiff's first prayer. *Day vs. Allender*, 22 Md., 511; *Pue vs. Pue*, 4 Md. Ch. Dec., 386; *Washburn on Easements*, 132, 188; *Robinson, et al. vs. Webb*, 11 Bush, (Kentucky,) 464, 479.

There was no error in the instructions regarding contributory negligence. It was negligence, under the circumstances, to cross the field at night, in the manner shown by the evidence.

The Court properly refused to permit a rejected prayer to be read to the jury.

The use the plaintiff's counsel sought to make of the fact of the rejection of the defendants' second prayer, was especially objectionable, as they wanted the jury to infer from it, that the Judge entertained an opinion upon the question of fact, which he had allowed to go to the jury, namely, whether or not a highway had been proved to exist, adverse to the defendants.

Although, owing to the manner in which the case was left to the jury, the question arising in consequence of the fact that the excavation was made by an independent contractor, has become immaterial, it may well be contended that, as the excavation of the street was made according to a grade established by the municipal authorities, and was a thing right and proper to be done, and not in itself injurious, no responsibility attached to the owners of the ground, for any want of proper precautions in doing it, even if the contractor could be held liable, under the circum-

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stances of this case. *De Ford vs. The State*, 30 Md., 179; *Ellis vs. Sheffield Gas Consumers' Co.*, 2 El. & Bl., 767.

ALVEY, J., delivered the opinion of the Court.

The declaration in this case contains ten counts; and to the third, fourth, fifth, sixth, seventh and eighth, the defendants demurred; and to the other counts there were pleas filed, and issues joined. The demurrers were sustained, and upon the trial of the issues of fact a verdict was rendered for the defendants. The plaintiff has appealed, and we are now called upon to review the rulings of the Court below.

The third count, the first demurred to, alleges that the defendants were owners of a certain open and unenclosed lot of ground within the limits of the City of Baltimore, and that persons were in the habit of passing over the same; and that the defendants cut on such lot, in a dangerous and exposed portion thereof, a deep excavation, and left the same in a dangerous condition, and liable to injure persons passing over the said lot; and that the plaintiff, while passing over said lot, on a certain night, being ignorant of the excavation, fell therein and was injured.

This count entirely fails to state a sufficient cause of action. To constitute a good cause of action, in a case of this nature, there should be stated a right on the part of the plaintiff, a duty on the part of the defendants in respect to that right, and a breach of that duty by the defendants, whereby the plaintiff has suffered injury. Here there is nothing of the sort shown. All the facts alleged in this count may be true, and yet the plaintiff would have no right of action against the defendants. The fact that persons were in the habit of passing over the lot, gave to the plaintiff no right to do so; and unless there was such right there was no breach of duty on the part of the defendants in cutting and leaving open the

excavation. A party has the right to use his land as he pleases, except as he may be restrained by duty to the public or to private individuals. But any individual who complains of the manner in which a defendant may have used his own land, should show with certainty and precision both the right of the plaintiff and the duty of the defendant, and in what manner such right and duty have been violated. This count, as has been perceived, contains no allegation that there was any public way over the lot to entitle the plaintiff to pass over it, nor is there any allegation that the plaintiff, by reason of authority from the defendants, was lawfully or rightfully passing over the lot at the time of the accident. The only fact alleged to confer the right on the plaintiff is, that persons were in the habit of passing over the lot; but that this was insufficient to establish a right in the plaintiff is too clear for question. And having no right to be on the lot, according to the facts alleged in this count, the injury which the plaintiff suffered by falling into the excavation must be attributed exclusively to his own fault. "If I place a log across a public path," says DALLAS, J., in *Dean vs. Clayton*, 7 Taunt., 489; (2 Eng. Com. Law, 202,) "and injury be thereby sustained, the soil being my own, but the public, or individuals having a right of way over it, an action will lie, because there is a right in others to pass along without interruption; but if there be no right of way, I may with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained. So, in the case put of a ditch, I may not dig it, so as to interfere with any public or private right, but within the limit of my own property adjoining a common, and not separated from it by any actual fence, I may dig a ditch however wide; and man or beast sustaining harm, having no right to be there, no action will lie. Such was the case cited of the horse

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straying from the common, and falling into the pit, and in which it was determined that no action would lie, first, because the owner had a right to do what he pleased with his own land, and next, that the plaintiff could show no right for the horse to be there." This passage from the opinion of the learned Judge, delivered in the case referred to, has been often referred to and cited in subsequent cases, as containing a clear and correct statement of the law upon the subject of which it treats; and taking it to be correct, and applicable to this case, it would seem to follow, without further comment, that the ruling of the Court below in sustaining the demurrer to this third count was in all respects correct, and must, therefore, be affirmed. And as the sixth count is precisely the same in its averments as the third, except that the allegation in the sixth is, that the defendants *permitted* a deep excavation to be cut across said lot, which in the third allegation is, that the excavation was cut by the defendants themselves, it follows that the same principles which we have applied to the third count apply to the sixth also, and that the ruling of the Court in sustaining the demurrer thereto should likewise be affirmed.

As is stated in the plaintiff's brief, the fourth count differs from the third in alleging that there was a *public highway* across the lot, and that the defendants *permitted* a deep excavation to be cut over the lot and across this highway, and the plaintiff, while walking on the highway at night, fell into the excavation and was injured. And the fifth count differs from the fourth only in alleging that there was a *roadway in public general use* across said lot, instead of a public highway, as alleged in the fourth count. But, in considering the questions that arise on these counts, the difference mentioned may be treated as matter of form rather than substance, as by so doing the fifth count is taken in the most favorable sense to the plaintiff, which, under the well established rules for the construction of pleadings, is not allowed.

Now, it is certainly true, that every person who does or directs the doing of an act that will of necessity constitute or create a nuisance, is personally responsible for all the consequences resulting therefrom, whether such person be employer or contractor. *Wilson vs. Peto*, 6 *Moore*, 49. And where, as in this case, a person is sought to be made responsible for a nuisance, not simply on the ground of his being the owner of the ground on which the nuisance exists, but because he has ordered or directed the doing of an act in a public highway which has created a nuisance, it is necessary that the act be alleged either as having been done or caused to be done by the defendant himself, or by others under his direction and authority. *Addison on Torts*, 197.

Here, the allegation is, not that the defendants cut the excavation, and left it in a condition dangerous to persons passing along the highway, but that they *permitted* others to do so. How permitted? The sufficiency of this allegation turns upon the word "permitted." In what particular sense it was used by the pleader is altogether uncertain. It may be, for aught that appears on the face of these counts, that the defendants permitted the excavation by their mere silence and failure to interfere, or by not taking active measures to prohibit the making of the excavation over the lot and across the highway. Where there is want of certainty in the allegation of a pleading, the general rule is, that the sense of the averment is to be taken most strongly against the pleader; *Chit. Pl.*, 237, 238; and giving to the defendants the benefit of this rule, the counts under consideration fail to state a sufficient cause of action. Mere permission in the sense suggested, would not be sufficient to render the defendants liable, without something more. It does not follow that because the defendants are the owners of the lot that they are liable for all the nuisances that may be created thereon, no matter by whom. This is illustrated in the case of land-



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lord and tenant. If a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance, if the latter should think proper to do so. *Owings vs. Jones*, 9 Md., 108; *Rich vs. Basterfield*, 4 C. B., 805, (56 E. C. L., 782.) In such case, it may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such sense as to render him liable. We think there can be no doubt of the correctness of the ruling of the Court below, in sustaining the demurrer to these counts.

By the seventh count, also demurred to, it is alleged that the defendants were the owners of a certain lot of ground, over which, for many years, they had *permitted all persons* to cross and recross at pleasure, without hindrance or interruption; and that under and by virtue of this *permission, leave and license*, the public generally were in the habit of crossing and recrossing said lot at pleasure; and that the defendants, with knowledge of this general user by the public, and without notice or warning, and without revoking the permission or license, cut a deep trench through said lot, and across the usual road or pathway on which persons were in the habit of crossing said lot, and left open and unguarded said trench or excavation; and that the plaintiff, without knowledge of the existence of the excavation, while crossing the lot on the usual road at night, fell into the excavation and was injured.

It is clear, there is nothing here alleged to constitute a public nuisance; and the only question is, whether the allegation that the defendants permitted all persons to cross and recross the lot at pleasure, without let, hindrance or interruption, and that the public generally were in the habit of so crossing and recrossing the same, under and by

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virtue of said permission, leave and license, is sufficient to show in the plaintiff a positive right, such as is required to sustain this action? To determine this question in favor of the plaintiff would require a construction more liberal than the terms of the allegation will fairly warrant. There is no positive right alleged; and without such right the action cannot be maintained.

In the case of *Hounsell vs. Smyth*, 7 C. B., (N. S.) 731, the declaration stated that the defendants were seized of certain waste land, upon which there was a quarry worked by certain persons subject to the payment of certain royalties to the defendants; that this waste land was open to the public, "*and that all persons having occasion to pass over the waste land had been used and accustomed to go upon and across the same without interruption or hindrance from, and with the license and permission of, the owners of the waste land;*" that the quarry was dangerous to those who might have occasion to cross over the waste, etc., and that the defendants, knowing the premises, negligently and contrary to their duty, left the quarry unfenced and unguarded, and took no care and used no means for guarding or protecting persons passing over the waste land from falling into the quarry; and that the plaintiff, while crossing the waste, not being aware of the existence of the quarry, and being unable to see it by reason of the darkness of the night, fell therein and broke his leg. Upon demurrer to this declaration, it was held, that there was no cause of action disclosed; and the Court, in its judgment, said: "No right is alleged. It is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint;—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils." If that

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case was well decided it would seem to be quite decisive of the present question ; and that it was well decided we have no doubt. It has been sanctioned and followed in several subsequent cases, after full consideration. *Binks vs. South York and River Dun Co.*, 3 B. & S., 244 ; *Bolch vs. Smith*, 7 H. & N., 736 ; *Gautrel vs. Egerton*, L. R., 2 C. P., 371. In the last case cited the question was also raised upon demurrer as it is in the case before us ; and there the declaration stated that the defendants were possessed of land with a canal through it, and a bridge over the canal ; which land and bridge were used *with the consent and permission* of the defendants by persons passing to and from certain docks ; that the bridge was wrongfully and improperly kept by the defendants, and that one G., while lawfully passing over the bridge, fell and was drowned, by reason of the unsafe condition of the bridge. It was held that there was no cause of action disclosed under the statute giving a remedy for the death of a person caused by the wrongful act, neglect, or default of another.

There is no doubt, however, of the general proposition, that an obstruction or excavation made on a party's own land, and lawfully made, may give rise to an action, upon proof that such obstruction or excavation was concealed, and the plaintiff was invited or induced by the act or conduct of the defendant to pass over or near such obstruction, in ignorance of its existence, whereby injury resulted. In such case the plaintiff would have a right to rely upon the good faith of the defendant. And to this effect are several of the authorities relied on by the plaintiff's counsel in this case ; but there is nothing shown on the face of the count under consideration to justify the conclusion that the plaintiff was in any manner invited or induced, by any act of the defendants, to pass over the lot where the accident occurred.

It follows, from what we have said, that the Court below committed no error in sustaining the demurrer to

the seventh count of the declaration ; and as the eighth count is the same as the seventh, except that it alleges that the defendants *permitted* the excavation to be made and kept open by others, instead of by themselves, as in the seventh count, it follows from what has been said in reference to the fourth and fifth counts as well as the seventh, that the demurrer to the eighth count was properly sustained by the Court below.

And having disposed of the questions raised on the pleadings, we have now to consider the questions raised by the prayers which were ruled upon by the Court below, and embraced by the bill of exceptions taken by the plaintiff.

The question as to whether there was a public road or thoroughfare through or over the lot was fully submitted to the jury by the Court in granting the first and fifth prayers of the plaintiff ; and as that question has been negatived by the finding of the jury, there should be no longer any contention in regard to that fact. It may, therefore, be assumed and taken as an ascertained fact that there was no such road or thoroughfare as that put to the jury to find in the prayers referred to.

Upon careful examination of the case, we think the plaintiff obtained all the instruction to which he was entitled in the granting of his first, fifth, eleventh and twelfth prayers ; and indeed, it may be questioned, whether he was not allowed to occupy a more favorable position before the jury than he was entitled to occupy, in view of the evidence of the case, and especially that produced by himself.

He proved by Hay, the contractor for grading Cole street, that he, Hay, was engaged in the business of grading, curbing and paving streets ; and that he graded Cole street from the west building line of Mount street to the east line of Fulton street, under an agreement with James Carroll, acting for himself and the other heirs of Charles

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B. Carroll, several of whom, it is admitted, are infants. By the agreement, produced in evidence, Hay covenanted to do all the excavation in Cole street between the points just mentioned, and to complete such excavation within seven months. The plaintiff further proved by witness Hay, that in digging and excavating the bed of Cole street, the witness acted under the written contract produced ; that Cole street ran through the lot, and that the grade of the street had been established by the city authorities, and that the witness made the excavation to conform to such grade, which he received from the authorities of the city. The witness further proved that he commenced excavating the bed of the street in November, 1873, soon after the date of the contract, and finished the excavation and curbing in November, 1874. And after offering evidence tending to show that there was a roadway running over and across the lot, from the corner of Fulton and Ramsay streets, in a southerly direction, to and across the Baltimore and Ohio Railroad, near the Mount Clare Station, to the West Baltimore Schuetzen Park, and as to the manner in which such way was used, the plaintiff then offered evidence to prove that the bed of Cole street crossed said roadway, and in excavating Cole street the contractor Hay cut over the lot, and across this roadway, a deep excavation, 12 or 14 feet deep, and about 40 feet wide ; and that no notice or warning of the intention to make such excavation was given, nor any guard erected to prevent people from falling therein, and that such excavation was in this condition about two or three weeks before the accident occurred.

The defendants gave evidence to disprove the existence of any established roadway over the lot ; and proved by Hay, the contractor, that shortly after he made the contract for grading Cole street, he ploughed up the entire surface of the street bed, between Mount and Fulton streets, and that this ploughed surface was visible to everybody down

to the time of the accident, and indicated the place and extent of the proposed excavation; that he commenced excavating at Mount street, and worked regularly along toward Fulton street, using ordinary care; that the work had been going on continuously from November 1873 to to May 1874, the time of the accident; and that Hay was still at work when the accident happened. It was also proved that the lot was part of an open common, and that people crossed it as they crossed any other common in the suburbs of the city, where they pleased and when they pleased; that there were paths and road tracks in different directions across the lot, some better defined than others, but none to be called regular roads. Cole street is one of the streets regularly delineated on Poppleton's Plat, the regular map of the city, made by authority, over fifty years ago.

There was no evidence whatever that any of the defendants ever exercised any control or supervision over the work, except as they were owners of the lot and had contracted with a competent workman to grade the street as laid out and defined on the city map, according to the gradient established by the municipal authorities. The contracting for the work was certainly a lawful act, and the making of the excavation, which was necessary in the execution of the work, was equally so; and in order to render the defendants liable there must be shown a breach of duty by them to the plaintiff, in respect to some right of his to pass and repass over the lot.

The question of the existence of a public highway or thoroughfare having been settled by the verdict of the jury adversely to the plaintiff, he now attempts to maintain a right to pass over the lot by what is called an implied or constructive license from the defendants. It was not proved, nor is it contended, that there was ever any express license or consent given either to the plaintiff or to the public generally to pass and repass over the lot; but

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it is said that because the lot was an open common, and every person was allowed to pass over it who desired to do so, and that people were in the habit of so passing, without hindrance or objection from the defendants, therefore, by legal construction, a license is to be implied to the plaintiff to pass and repass at pleasure, until such license was revoked by some positive act or declaration of the defendants. But we think this conclusion is not warranted by the facts relied on by the plaintiff; for if it be conceded that people did so use the lot, in the absence of authority for such user, the presumption would be that they were trespassers, unless the user was of a character and duration to be evidence of a right of way in the public by prescription,—a proposition no longer involved in this case. If, however, it could be concluded from the evidence that there was such license or permission as contended for by the plaintiff, it is shown by the authorities already cited, that such license or permission conferred no such right upon the plaintiff as to entitle him to sue the defendants for obstructing the way, unless there was some concealed trap or excavation made in the way, which the plaintiff could not have discovered by the use of ordinary and proper diligence while in the use of the license. Here the excavation across the supposed way over the lot was open to the view of every one, and had been open for two or three weeks before the accident occurred, and was made in opening and grading one of the public streets of the city, the work on which had been in regular progress to that point for six months previous. It is true, says MARTIN, B., in *Bolch vs. Smith*, 7 H. & N., 745, (a case before referred to,) “the plaintiff had permission to use the path. Permission involves leave and license, but it gives no right. If I avail myself of permission to cross a man’s land, I do so by virtue of a license, not a right. It is an abuse of language to call it a right: it is an excuse or license, so that the party cannot be treated as a tres-

passer. Inasmuch as there was another way by which the plaintiff might have gone, but voluntarily chose the one which was out of order, I think he has no right of action against the defendant, and that he ought to have been nonsuited at the trial." This was said, not in reference to a matter of pleading, but upon the evidence, as in the present case; and it was but the adoption (which was done in express terms) of the principle of the previous case of *Hounsell vs. Smyth*, 7 C. B., (N. S.) 731, to which we have before referred. These cases announce no new principle, but were decided in accordance with the maxims and well established principles of the common law; and they are quite distinguishable from that class of cases to which *Corby vs. Hill*, 4 C. B., (N. S.) 556, belongs. In that case, the action was brought by the plaintiff for damages sustained while passing over a road leading from the main or turnpike road to an asylum and the residence of the superintendent adjoining thereto. It was there alleged and shown that the plaintiff, having lawful occasion to be on the road, was on it by the leave and license of the owners thereof, and that the defendant negligently obstructed the way by placing thereon certain building materials without giving notice or warning of the obstruction, and that, by reason thereof, the plaintiff's horse was driven against the obstruction, and injured; and it was held that the plaintiff was entitled to recover. But the right to maintain the action was put upon the distinct ground, as stated by COCKBURN, C. J., that the proprietors of the soil had held out an allurement whereby the plaintiff was induced to pass over the road thus obstructed; "they held out the road to all persons having occasion to proceed to the asylum as the means of access thereto;" and as the owners of the soil could not justify, it was held that the defendant, acting under their license in placing the obstruction on the road, could not, and was therefore liable.



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But, upon the assumption that there was a license or permission to the plaintiff to pass over the lot, it is contended that notice or warning should have been given of the existence of the excavation, according to the principle of the case of *Corby vs. Hill*, and that the defendants committed a breach of duty in their omission to give such notice or warning. To this, however, it may be answered, that, even conceding the license or permission to pass as claimed by the plaintiff, and that warning of the obstruction in the way should have been given, yet we think very ample warning was given, under the circumstances of the case, in the progress and condition of the work itself. All the plaintiff's prayers, except the three last, concluded to his right to recover upon the facts therein enumerated, and these prayers, thus concluding, were, in effect, concessions of the truth of all such parts of the defendant's evidence as had been offered for the purpose of qualifying or avoiding the supposed right upon the plaintiff's action was founded; and if such evidence was sufficient to qualify or avoid the right asserted by the prayers, such prayers were properly rejected. Now, the uncontradicted evidence in regard to the condition and progress of the work is, that the contractor Hay, soon after his contract in November, 1873, ploughed up the entire surface of the proposed street bed, and that this ploughed surface was visible to every one down to the time of the accident in May, 1874; and that the work had been in a regular state of progression, and at the place where the accident occurred the excavation had been open and visible to every person passing in that direction for two or three weeks before the plaintiff was injured.

The principles we have stated fully cover all the facts of this case; and we think the Court below was entirely right in rejecting the second prayer of the plaintiff, and in granting the seventh prayer of the defendants, to the effect that there was no sufficient evidence in the cause of the exist-

ence of any public highway over the lot by *dedication*. And the Court was correct in rejecting the sixth prayer of the plaintiff, not only for the reason just stated, but because that prayer failed to define what would constitute a legal dedication of a way to public use. The jury were not the tribunal to determine that question. They were competent to find the existence of facts to fulfil the definition, but not to determine the definition itself.

The third prayer of the plaintiff was properly rejected, upon the ground that the mere implied or constructive license sought to be deduced from the facts therein stated, gave the plaintiff no right, and imposed no obligation upon the defendants, according to the principles heretofore stated. And the fourth prayer would seem to present substantially the same question as the first, and is therefore immaterial, inasmuch as the first was granted; and the seventh, eighth and ninth prayers were also properly rejected upon the same principle that the third was rejected; and the tenth was rejected for reasons apparent upon the face of the prayer itself, and because in conflict with the principles herein expressed.

The third prayer on the part of the defendants, which was granted, we do not understand to be controverted by the plaintiff; and we think the other prayers of the defendants which were granted were all free from objection, upon the principles we have stated in reference to the propositions made by the plaintiff. And it follows, therefore, that there was no error committed by the Court below, in its rulings upon the prayers of the respective parties.

While the case was being argued before the jury, one of the plaintiff's counsel in support of his argument that there was evidence to establish the existence of a public highway over the lot, proposed to read to the jury a rejected prayer offered by the defendants, to the effect that there was no sufficient evidence in the cause of such high-

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way. To this the counsel of the defendants objected, and the Court sustained the objection, and we think most properly. The jury have nothing to do with rejected prayers, and counsel should not be allowed to refer to them, for the purpose of influencing the conclusions of the jury in regard to the facts before them. Such a practice would be exceedingly pernicious in its consequences, and it has never been allowed.

Finding no error in any of the rulings of the Court below, we shall affirm its judgment.

*Judgment affirmed.*

(Decided 2nd March, 1877.)

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GEORGE W. DONOHUE *vs.* JOHN T. SHEDRICK.

*Admissibility of Evidence—Irrelevant and Rebutting Evidence—Questions in regard to bills of exceptions.*

In an action by a bricklayer to recover a balance due him for laying the bricks in certain houses of the defendant, the plaintiff offered to prove by a measurer, that he had measured the buildings in question by a rule adopted by the trade in the City of Baltimore, which had been tested and found correct, and that by the measurement so made the buildings contained a certain number of bricks. Upon objection to this evidence, upon the ground that as it was shown that the bricks were of unequal size, a correct estimate of the number in the houses could not be ascertained by said rule of measurement, it was HELD:

- 1st. That the evidence was admissible, but it was the province of the jury alone to give such effect to it as they might think it entitled to.
- 2nd. That it was no error in the Court below to refuse to incorporate in a bill of exceptions, evidence given after said bill of exceptions had been signed and sealed.
- 3rd. That in the said action to recover for laying a certain number of bricks, evidence by the defendant that he had only paid the brickmaker for a lesser number, was irrelevant to the issue and inadmissible.

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The defendant having given evidence of the measurement of single bricks and single square feet, tending to show that the rule stated by the plaintiff's measurer was incorrect, and that the salmon brick in the defendant's houses occupying the partition and inside walls above the first floor joists, held a proportion of two-thirds of the whole number, and that by the correct rule there were thirteen bricks and a fraction to the square foot, in a nine inch wall, the plaintiff offered proof by measurers and a bricklayer acquainted with the trade, and with the modes and rules of measurements, that they had measured single bricks of the largest size in the buildings in question, and also in several places in the walls where the bricks were largest had measured square feet, and then offered to prove how many bricks by their measurement and calculation were in a square foot of the walls. On objection, it was **HELD** :

That this evidence was clearly admissible in rebuttal of the proof introduced by the defendant as to the measurement of single bricks and square feet in the walls.

An exception cannot be taken to the refusal of a Court to sign and seal a bill of exceptions.

#### APPEAL from the Court of Common Pleas.

The appeal in this case is taken by the defendant below from the rulings of the Court below, (GAREY, J.,) upon several bills of exceptions, the nature of each of which is stated in the opinion of the Court.

The jury rendered a verdict for the plaintiff, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., STEWART, BRENT, GRASON, MILLER and ALVEY, J.

*O. F. Bump*, for the appellant.

*E. B. Bates*, for the appellee.

GRASON, J., delivered the opinion of the Court.

This was a suit brought by the appellee, a bricklayer, against the owner of certain buildings in Baltimore City, to recover a balance alleged to be due him for laying the

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bricks, and this appeal was taken for the purpose of having reviewed the rulings of the Court of Common Pleas of Baltimore City, upon points of evidence raised during the trial, and in which rulings it is alleged that there is error. The amount involved in the suit is very trifling, and the points raised in the several exceptions are very plain, and we have no difficulty in disposing of them.

*First Exception.*—This exception was taken to the admission of the testimony of a measurer, to prove that he had measured the buildings in question by a rule adopted by the trade in the City of Baltimore, which had been tested and found to be correct, and that by the measurement so made the buildings contained two hundred and three thousand, eight hundred and fifty-four bricks. It was contended by the appellant's counsel that, as it was shown that the bricks were of unequal size, a correct estimate of the number in the houses could not be ascertained by the rule of measurement adopted and practiced by the trade. The evidence was certainly admissible, but it was the province of the jury alone to weigh it and give such effect to it as they might think it entitled to, and there was no error in admitting it.

*Second Exception.*—After the evidence as set out in the first exception had been given, and after the signing and sealing of that exception the measurer was cross-examined, and then the counsel for the appellant requested the Court to incorporate in the first bill of exceptions, the evidence given by the witness upon his cross-examination, and upon the Court's refusal to incorporate it, this exception was taken to the refusal. What the witness proved upon his cross-examination, did in nowise affect the admissibility of his evidence in chief, or change the principles of law governing its admissibility. The only possible effect of the proof of the witness upon his cross-examination, was to weaken the force of his proof upon his examination-in-chief; and for this purpose the appellant had the

full benefit of it before the jury. The Court below therefore, very properly refused to insert in the first bill of exceptions, the proof given after that bill of exceptions was signed and sealed.

*Fourth Exception.*—For the reasons already given, the Court also correctly refused to incorporate in the third bill of exceptions, the evidence given by the witness after that bill of exceptions had been signed and sealed.

*Third Exception.*—This exception was taken to the refusal of the Court to permit the appellant to offer proof, that the brickmaker had received pay from him for only one hundred and eighty-two thousand seven hundred bricks. This evidence was clearly inadmissible. The issue to be tried by the jury, was as to the number of bricks the appellee had laid, and not the number that the appellant had paid for. The evidence offered did not tend to throw any light upon that question, for it might be perfectly true, that the appellant might have *paid for* only one hundred and eighty-two thousand seven hundred bricks, while it might be equally true, that he had purchased, and the appellee had laid two hundred and three thousand eight hundred and fifty-four bricks. The evidence offered in this exception was irrelevant to the issue to be tried as it tended to prove nothing, beside the fact that the brickmaker had *been paid* for only one hundred and eighty-two thousand seven hundred bricks. As we have before said this may have been true, and yet more than that number may have been delivered by the brickmaker, and used by the appellee in the erection of the buildings, and the evidence offered was properly rejected.

*Fifth Exception.*—The appellant having given evidence of the measurement of single bricks and single square feet, tending to show that the rule stated by the appellee's measurer was incorrect, and that the salmon brick in the appellant's houses, occupying the partition and inside walls above the first floor joists, held a proportion of two-

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thirds of the whole number, and that by the correct rule there were thirteen bricks and a fraction to the square foot in a nine inch wall, the appellee then offered proof by measurers and a bricklayer acquainted with the trade and with the modes and rules of measurement, that they had measured single bricks, of the largest size, in the buildings in question, and also in several places in the walls where the bricks were largest had measured square feet, and then offered to prove how many bricks by their measurement and calculation were in a square foot of the walls. To the admission of the proof thus offered the appellant, by his counsel objected, but his objection was overruled and the evidence was admitted, and he took this exception. The evidence was clearly admissible in rebuttal of the proof introduced by the appellant as to the measurement of single bricks and square foot in the walls.

*Sixth and Seventh Exceptions.*—It appears from the sixth bill of exceptions, that while the appellee's counsel was addressing the jury, he handed to the foreman of the panel the agreement of the parties and called attention to an unsigned endorsement on the back of it, whereupon the appellant's counsel objected to the endorsement being used. It was at once taken from the jury and handed to the Judge, who after inspecting it, decided that it was admissible evidence to be used before the jury. The appellant then took his sixth exception, but before it was signed and sealed the appellee's counsel waived his right, under said ruling of the Court, to use the endorsement before the jury, and did not use it, having abandoned it as evidence. The memorandum or endorsement on the back of the agreement having been abandoned as evidence in the presence of the jury, and not used, the Court below refused to sign and seal the sixth exception, tendered by the counsel for the appellant, whereupon he took his seventh exception (of which the sixth, which the Court refused to sign and seal is made part) to its refusal. The

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sixth exception is therefore not before us for review, and neither is the seventh, for the reason that an exception cannot be taken to the refusal of a Court, to sign and seal a bill of exceptions. See *Marsh vs. Hand*, 35 Md., 126.

*Judgment affirmed.*

(Decided 2nd March, 1877.)

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RICHARD H. WOOLLEN, Trustee *vs.* WILLIAM F.  
FRICK and JAMES C. GOLDER, Executors of HENRY  
WATSON.

*Question as to allowances to the Executors of a deceased trustee for expenditures made by the latter under an order of Court.*

H. W. as life-tenant and trustee for certain *cestuis que trust* in remainder, filed a petition for, and obtained an order allowing him to apply a certain sum, part of the trust fund in his hands, for permanent improvements of a farm, provided no cause to the contrary was shown by a day named in the order. The order was duly served on the *cestuis que trust*, and no cause to the contrary was shown by them. The improvements were made, but no account thereof was presented to the Court, the trustee having died before a report was filed by him. On a bill filed by a new trustee against the executors of H. W., it was HELD:

That it was too late to object to the authority of the Court to pass the order, as such objection ought to have been made when notice of the order was served upon the *cestuis que trust*. Or they ought to have appealed from the order within the time prescribed by law.

The order did not require the trustee to report the nature and character of the expenditures before they were made, but required that after making the improvements he should report the same to the Court, in order that the Court might see whether they had been made in conformity with its order.

HELD:



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That the failure of H. W. to report his proceedings under the order presented no ground for disallowing his executors such sum as they could show to have been properly expended by him under the order.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The case was argued before BARTOL, C. J., STEWART, BRENT, GRASON, MILLER and ROBINSON, J.

*Charles Marshall*, for the appellant.

*William F. Frick*, for the appellees.

ROBINSON, J., delivered the opinion of the Court.

Upon the petition of Henry Watson, a life-tenant, and trustee for *cestuis que trust* in remainder, the Superior Court of Baltimore City, in equity, on the 31st January, 1859, passed an order allowing the petitioner to apply a sum not exceeding three thousand dollars, part of the trust funds in his hands, for permanent improvements on a farm in Baltimore County, provided no cause to the contrary thereof was shown on or before a day named in said order.

The service of this order was duly made on the *cestuis que trust*, and no cause to the contrary was shown by said parties in interest.

The trustee Watson made the proposed and other permanent improvements on the farm, and died in 1871, without having made any special report of his disbursements under the order. The appellees, his executors, found among his papers carefully prepared statements with vouchers, intended as the basis of such report, and one of them stated he had been applied to by the trustee, as his solicitor, to make up from such papers, a proper

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report and file the same, but the trustee died before the same was fully prepared.

His executors, from the papers and information which came to their possession, reported to the Court the disbursements which had been made by Watson under the order.

This report showed expenditures largely in excess of the sum of three thousand dollars allowed by the Court.

After the death of Watson, the appellant, one of the *cestuis que trust* in remainder was appointed trustee, and as such, filed a bill against the executors of Watson, for an account and delivery to him of the trust property in the hands of the former trustee at the time of his death.

The personal trust fund having been decreased by the use of three thousand dollars by Watson under the order of the Court, his executors claimed to be allowed that sum, and to deduct the same from the trust fund remaining in the hands of Watson at the time of his death.

The appellant objects to this allowance on several grounds. First, it is said there is no sufficient proof of the expenditure. Now we have read the testimony very carefully, and it proves conclusively, that he expended between two thousand and twenty-five hundred dollars to the erection of a tenant-house, five hundred dollars on the barn, and other sums in the construction of an ice-house, fencing, &c., besides four to five thousand dollars on the dwelling-house. Even conceding the latter expenditure to have been unnecessary, and not within the order, it is clear we think that he expended the full sum of three thousand dollars.

Then it is said, the Court had no power to pass the order.

This objection comes too late. It ought to have been made when notice of the order was served on the *cestuis que trust*.

Or they ought to have appealed from the order within the time prescribed by law. Having thus acquiesced in

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and permitted the life-tenant and trustee to make these improvements, they will not now be allowed to object to the expenditure, on the ground that the Court erred in passing the order.

Then, as a third and last objection, it is said the trustee did not make his report of the disbursements to the Court and did not therefore comply with the order. It is a sufficient answer to say, that the order did not require the trustee to report the nature and character of the expenditures before they were made. On the contrary, it only required that after making the improvements, he should report the same to the Court, in order that the Court might see whether the improvements had been made in conformity with its order. And the only question that could arise upon the report, was, whether the money had been properly expended by Watson? The appellant has the same right to raise that question now upon the report made by the executors. We are unable, therefore, to see how or in what manner the parties in remainder are injured, because the report was not made by Watson.

There was no error in judgment in thus allowing the executors the sum of three thousand dollars, and the order will be affirmed.

*Order affirmed.*

(Decided 2nd March, 1877.)

GEORGE W. WILSON, and FREDERICK SASSCER, and  
 SAMUEL B. HANCE, Administrators of ZADOCK  
 SASSCER, JR. vs. CHARLES RIDGELY, JR., Surviving  
 Obligor, WILLIAM A. JARBOE, Garnishee, and  
 MARGARET ANN RIDGELY, Claimants, &c.

*Pleading in Action on Collector's bonds—Principal and surety—  
 Assignment of judgment—Execution—Misjoinder—Funds in  
 the hands of public officers not liable to attachment.*

In suits upon collector's bonds no assignment of breaches is necessary.

In an action on a collector's bond, judgment was entered in 1866, for the penalty of the bond, "to be released on payment of the amount of the Comptroller's certificate, and subject to such insolvencies and removals as may be certified to the Treasurer by the County Commissioners." On the 12th of August, 1869, the certificate of the Comptroller was filed in the case showing the amount due the State with interest, and the judgment was extended for this sum. Afterwards the judgment was credited upon the Comptroller's certificate with certain sums for insolvencies, and afterwards, on the same authority, with a further sum for interest upon the judgment, which was "remitted or authorized to be done by law." This judgment was afterwards satisfied by the payment of the whole amount due thereon, by W. one of the sureties, and the administrators of S. another surety, who had died before the institution of the suit; and thereupon the judgment was entered to the use of W. for one-half the amount then due thereon, and to the use of the administrators of S. for the other half of said amount. Afterwards an attachment on the judgment was issued by W. and the administrators of S., and laid in the hands of J. upon certain funds alleged to be held by him as county treasurer, the same being the surplus proceeds of the sale of land, assessed to the principal debtor in the judgment for taxes due and unpaid by him. On motion to quash the attachment, it was HELD:

- 1st. That the credits on the judgment could not now be urged against its validity.
- 2nd. That the defendants in the original suit having appeared by attorney, and no pleas having been filed, it must be assumed, that the judgment was entered by the consent of their attorney.

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- 3rd. That inasmuch as S. had no judgment recovered against him, but had died before the suit was begun, his administrators were not entitled to an assignment of the judgment recovered against the principal and the other sureties, and to execution thereon, notwithstanding they may have satisfied the said judgment.
- 4th. That to entitle a surety to an assignment and execution against his co-sureties under sec. 7 of Art. 9 of the Code, it is incumbent upon him not only to satisfy the judgment, but to pay the *whole amount* of it.
- 5th. That if W. had satisfied the judgment in this case, that is *paid the balance* due upon it, he was entitled to an execution against his *principal*, but *not* against his *co-sureties*, for it appeared he did not pay the *whole* debt for which the judgment was rendered.
- 6th. That he could not, however, join with the administrators of S., even if they were entitled to an assignment and execution, as the assignment was not to them jointly, but one-half to each of them.
- 7th. That such joinder was therefore fatal to the attachment.
- 8th. That the surplus proceeds of the land of the attachment debtor, sold for non-payment of taxes, was not liable to attachment in the hands of the county treasurer.

APPEAL from the Circuit Court of Prince George's County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY and ROBINSON, J.

*Richard B. B. Chew* and *William H. Tuck*, for the appellants.

Under the circumstances of this case Wilson was clearly entitled to an assignment of the judgment, and to execution by attachment, or otherwise, for the amount paid by him. The judgment was *fully* paid to the State. *Nothing* remained due—one-half having been paid by Wilson and the other half by Sasscer's estate. The case of *Hollingsworth vs. Floyd*, 2 H. & G., 87, was decided on the ground

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that there had been a *partial* and not a full payment of the judgment by a surety, and because the Courts will not recognize the *anomaly* of creating distinct interests in the same debt, in both creditor and surety. Here no such anomaly exists—and Wilson's right to the assignment of the judgment, and of execution for the amount paid by him, is clearly within the principles of the said decision, and the legislation of this State upon this subject. Code, Art. 9, sec. 6 ; 1864, ch. 243. The fact that one-half of the debt was paid by Sasscer's estate, against whose administrators no judgment had been recovered, cannot deprive the other surety, who has paid one-half of the judgment for the same debt against the principal and himself, of the assignment for one-half of the judgment so paid by him, as against the principal. The other half of the debt being paid, the payment of his half is all the creditor could demand, and entitles him to an assignment *pro tanto* of the judgment, and to the right of the execution in his own name; and he takes, by the assignment, the same rights which the creditor had, who had been fully paid, as to the amount so paid by him. He could not have satisfaction of the judgment for a greater amount than he had paid; and the judgment for the amount paid by Sasscer's estate would remain as a security for the benefit of that estate, if the administrators are not entitled to the assignment under the Act of 1864, ch. 243. If the administrators of Sasscer are not so entitled, the fact of their being joined in the attachment, does not invalidate the writ as to Wilson. In *Hollingsworth vs. Floyd*, the writ was sustained as to Hollingsworth, the original creditor, whose position Wilson occupies. Moreover, the third reason concedes, that if there had been a separate judgment against Sasscer's administrators, that Wilson and Sasscer's administrators would have been entitled to separate executions for the amounts respectively paid by them.

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It is said there was no judgment against Sasscer's administrators, and that his administrators are not entitled to an assignment of the judgment under the Act of 1864, ch. 243, for the amount, which it is conceded, was paid by Sasscer's estate.

It is admitted that no case precisely similar in circumstances to this has been decided in this State, namely, whether a surety on a bond who pays the debt before a judgment against him, but after judgment against the principal, or against the principal and another surety, is entitled to an assignment at law, of said judgment in whole or in part, according to his payment of the whole or part of the debt.

But analogous principles have been decided, and it is submitted that these administrators are embraced in the equitable operation of those principles. In *Hollingsworth vs. Floyd*, the Court declares that a surety, who has paid the whole debt, is entitled to an assignment of the judgment, and all liens which the principal had given the creditor. The principle is the same where two sureties, against whom judgments have been recovered, pay the debt in equal or unequal proportions, they are entitled to the assignment in the proportions in which they have paid.

In *Sotheron vs. Reed*, 4 H. & J., 309, and *Norwood vs. Norwood*, 2 H. & J., 238, where there were separate judgments against the principal and the surety, and the latter paid the judgment against him, the Court sustained an execution on a judgment against the principal, endorsed for the use of the surety without any assignment of the judgment, on the ground that the *payment* by the surety operated at law, and in equity, as an assignment of the judgment against the principal debtor, and that therefore it was strictly correct to carry on the execution against the principal, for the use of the surety, to its full completion. In the case of *Smith's Ex'rs vs. Anderson, et al.*, 18 Md., 520,

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where separate judgments had been recovered, one against Wm. Anderson, principal, and Absalom Anderson, one of the sureties, (which had been superseded by Wright and Clary,) and another against the executors of Smith, the other surety, with Absalom Anderson for William P. Anderson, in the same bond to John H. Anderson, who, by execution, caused the executors to pay the full amount of the judgment against them out of their testator's assets, it was decided that the executors were entitled to an assignment of the judgment against William P. Anderson and Absalom Anderson, and to enforce the payment thereof against Absalom Anderson, for one-half of the amount against him and Wm. P. Anderson—the latter being insolvent. When a judgment is rendered against the principal, or against the principal and one surety, and their liability is then ascertained and determined, cannot another security pay the debt before judgment, save himself the cost of further litigation, and by such payment become entitled to an assignment of the judgment and execution against the principal, as in *Sotheron vs. Reed*, or to an execution in his own name, to such rights of assignment as a Court of equity would accord to him under similar circumstances? Can the fact that no judgment is rendered against the surety, vary his equitable right to the assignment of the judgment and execution against the principal resulting from his payment? Can't he perform his honest contract without the compulsory process of the law, and having the sheriff's hands laid upon his property? It is the *payment* of the debt by the surety which creates the right to the assignment, and consequential right of execution—provided the original creditors were fully satisfied.

But here there was no voluntary payment—unlike the case of *Smith's Ex'rs vs. Anderson*; Sasscer died before judgment against him, and there was no judgment against his administrators—his estate was administered in equity,



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and these subjected to the payment of the amount for which the judgment was entered to the use of the administrators.

His liability was determined in that suit. The decree operated in the nature of a judgment for all the creditors, and after the decree in that case, there could be no judgment at law against the administrators, and the suit against them ceased. *Brooks vs. Dent, Adm'r of Browner*, 4 *Md. Ch. Dec.*, 473.

It is submitted that payment by the estate of a surety under such circumstances, does entitle the representatives of that estate, under the Act of 1864, ch. 243, to an assignment of the judgment recovered by the creditor against the principal, as made in this case for the amount so paid.

In Virginia and Kentucky, it has been held that the record of a judgment or decree in one State against the principal and one surety in an administrator's bond, is evidence against another surety in the same bond, residing in another State, sued in the latter State for contribution, by the surety in the former State, who had paid the judgment there recovered, of the extent of the liability of the defendants in the State where the judgment or decree was recovered, and of the amount the surety, sued for contribution, was liable to pay in the State where sued. 1 *Robinson's Practice*, 226, secs. 1 and 2; *Cobb vs. Haynes*, 8 *B. Monroe*, 137; *Buford vs. Buford*, 4 *Manford*, 241; 1 *Greenleaf Ev.*, secs. 187, 527, 538, 539.

Under the 5th section of this Article of the Code, any surety in the class of obligations therein referred to, who shall pay or tender the money due thereon, whether the whole be due, or part has been previously paid, shall be entitled to an assignment, (of the obligation,) and may, by virtue of such assignment, maintain an action in his own name against the principal debtor.

And so under the 6th section, it is competent for the creditor to assign a judgment recovered against the prin-

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cial to the sureties, who may have paid it, although judgments may not have been recovered against all the sureties. These provisions of the Code, including the Act of 1864, ch. 243, are to be liberally construed as remedial and beneficial Acts. *Crawford vs. Brooke*, 4 Gill, 222.

The Courts in construing them have not held themselves bound by the strict letter or words of the law, but have aimed to give relief co-extensive with that which could be obtained in a Court of equity, in case of the refusal of the creditor to assign. In the case of *Anderson vs. Smith's Executors*, there was no judgment against Smith, one of the sureties, as there should have been if the words of the law prevailed, but against his administrators, and so in *Hall, Administrator vs. Creswell, et al.*, 12 Gill & Johnson, 49, yet the Court held that the surety by whom the debt was paid, was entitled to an assignment of the judgment against the principal and surety in the former case, and the executors of the principal in the latter case.

Can it be doubted that in equity, if the creditor here had been a natural person, he could be compelled to assign the judgment against Ridgely and Wilson, to Wilson and the administrators of Sasscer, upon the facts contained in the record? The cases cited support this proposition, especially the case of *Anderson vs. Smith's Ex'rs*, and also the right and duty of Comptroller and State's Attorney to make the assignment in this case.

It is asserted in the third reason, that if there had been a judgment recovered by Sasscer's administrators, and they had paid half the debt, they should have sued out a separate attachment. The assignees succeeded to the rights of the assignor. Before the Act of 1862, ch. 262, (Sup. to Code, vol. 1, Art. 29, sec. 16,) a plaintiff could have but one execution at the same time. That Act does not give the right to more than one execution at the same time, except where an attachment is to be laid in the hands of

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different garnishees, or to affect different funds or property than that seized under the first writ, or where a *fi. fa.* is to affect other property than that taken under the first writ.

On the fourth, fifth and seventh reasons to quash. It is submitted that the judgment upon the attachment issued is a final and valid judgment. There is nothing in the record to indicate that the breaches of the bond were not duly assigned. But it is not necessary in a suit upon a creditor's bond to assign the breaches for which the damages are claimed. The proceeding is regulated by the provisions of the Code, Art. 81, secs. 80 and 82.

On the sixth reason to quash. The attachment was laid in the hands of Wm. A. Jarboe, not as treasurer, and designed to affect a balance remaining in his hands, of the proceeds of sale of certain real estate, sold by him for the payment of State and county taxes, after the satisfaction of these taxes. The appellants claim that this fund belonged to Ridgely, notwithstanding the conveyances by him to his children, referred to in the pleas, because of the fraudulent character of these conveyances. It is conceived that the only question arising on this appeal as to this matter is, whether this balance, under the circumstances stated, was liable to attachment. The reasons relied on by the garnishee are, that the attachment was laid in his hands, as a public officer, seeking to attach money in his hands as treasurer, &c., which did not in fact belong to the defendant. It is to be observed, that the attachment was not laid in his hands as treasurer, and that he does not appear as garnishee in that character. The material ground alleged is, that the funds sought to be attached did not belong to the defendant. The appellants will rely on the following authorities in support of the right to maintain the attachment. *Hinkley on Attachment*, p. 38, sec. 103, p. 42, secs. 123, 124, 125; *Cockey, Garnishee vs. Leister*, 12 Md., 129; *Groome, Adm'r vs. Lewis*, 23 Md., 149.

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*Frank H. Stockett* and *C. C. Magruder*, for the appellees.

The joinder in the writ of George W. Wilson, against whom the judgment had been recovered, and the administrators of Zadok Sasscer, against whom no judgment had been recovered, was erroneous, and these parties, if entitled to an attachment at all, should have sued out several attachments, their interest being separate and distinct.

The judgment on which that attachment was issued, was interlocutory and not final, and furnished no proper record of a judgment on which an execution of *feri facias* or attachment could have issued. *Clammer, &c. vs. State, use of Beall*, 9 Gill, 279.

Said attachment was laid in the hands of William A. Jarboe, who, as the treasurer of the county, was a public officer, and against whom no attachment would lie. *Mayor and City Council of Baltimore vs. Basil Root*, 8 Md., 95, 101, 102; *Bulkley vs. Eckert*, 3 Barr (Penna.) Rep., 368.

The entry of said judgment for the use of George W. Wilson and the administrators of Zadok Sasscer, was not authorized by law, and was therefore void. *Peacock, Assignee of State vs. Pembroke*, 8 Md., 348; 1864, ch. 243, Sup. to Code, Art. 9, sec. 8; *Swan vs. Patterson*, 7 Md., 164; *Hollingsworth vs. Floyd*, 2 H. & Gill, 87; *Carroll vs. Bowie*, 7 Gill, 35.

GRASON, J., delivered the opinion of the Court.

The judgment on which the attachment in this case was issued, was recovered at November term, 1866, against Charles Ridgely, Jr., and George W. Wilson and Fielder Suit, two of his sureties, on a tax-collector's bond; Zadok Sasscer, the other security thereon, having died before the institution of the suit. It appears that the judgment was satisfied by the payment of the whole amount due thereon by George W. Wilson and the administrators of Zadok

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Sasscer, and thereupon the State's attorney for Prince George's County, upon the order of the Comptroller of the treasury, entered said judgment to the use of George W. Wilson for \$1042.06, and to the use of the administrators of Zadok Sasscer for the same amount, being the other half thereof. On the 14th June, 1875, after the assignment of the judgment to them, the appellants, Wilson, and the administrators of Zadok Sasscer, issued an attachment on the judgment, which was laid in the hands of William A. Jarboe, upon certain funds alleged to be held by him as county treasurer, the same being the surplus proceeds of the sale of land, assessed to Charles Ridgely, Jr., for taxes due and unpaid. Upon the return of the attachment, pleas were filed by the claimants of said funds, who are not before us on this appeal; and afterwards a motion to quash the attachment was filed, the motion was sustained, the attachment was quashed, and this appeal was taken.

It was contended by the counsel of the appellees, that the attachment was properly quashed, because the record does not disclose whether the judgment against the principal and sureties in the collector's bond, was ever properly entered, and because no breaches in the condition of the bond were ever assigned. Upon the return of the summons in that case, the defendants appeared by attorney and no pleas were filed, and it must be presumed that the judgment was entered by the consent of their attorney.

In suits upon collector's bonds, no assignment of the breaches of the bond is necessary, as Article 81, section 82, of the Code provides that, in reply to a plea of performance, the State may reply that the obligor or obligors hath or have not performed the condition of his or their bond, and give the special matter in evidence, and that it shall not be necessary to set out the breaches. The judgment was entered for the penalty of the bond, "to be released on payment of the amount of the Comptroller's certificate,

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and subject to such insolvencies and removals as may be certified to the Treasurer by the County Commissioners." On the 12th August, 1869, the certificate of the Comptroller was filed in the case, showing the amount due the State to be \$2783.63, with interest from June 21st, 1864, and the judgment was extended for this sum. Afterwards the judgment was credited, upon the Comptroller's certificate, with insolvencies amounting to the sum of \$649.89, and afterwards, on the same authority, with the further sum of \$49.62, interest upon the judgment which was "remitted or authorized to be done by law." The credits reduced the judgment to the sum of \$2084.12. These credits were for the benefit of the defendants; were authorized to be entered by the terms of the original judgment, and must be presumed to have been entered by their consent and authority, and cannot now be urged against the validity of the judgment.

At common law, a surety in a bond, upon which judgment had been recovered, had no right, upon paying the amount of the judgment, to have it assigned to him, so as to enable him to have execution against his principal or co-sureties.

To give him a more speedy and efficient remedy than the common law provided, the Act of 1763, chap. 23, sec. 8, was passed, which authorized an assignment of a judgment by the creditor to a surety in the bond, and an execution thereon in the name of the surety who had paid and satisfied the judgment. But it was held, under the provisions of this Act, that when the State had recovered a judgment upon bond with surety there could be no assignment to the surety satisfying the judgment, for the reason that there was no person authorized by law to make the assignment. So the law remained until the Act of 1864, chap. 243, amended Article 9 of the Code, by providing an additional section to come in after section seven, and which enacted, that "in any case where judgment

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shall be recovered by the State against any principal debtor and a surety or sureties, and said judgment shall be satisfied by said surety or sureties, the same shall be entered by the attorney representing the State to the use of the surety or sureties satisfying the same, on the said attorney filing in the case a certificate of the Comptroller stating that said judgment has been satisfied, and said surety or sureties shall then be entitled to execution in his or their own name or names, and subject to the same provisions provided in the last two preceding sections." The two preceding sections are sections six and seven, the former of which provides that when a judgment shall be recovered against a principal and surety, and the judgment shall be satisfied by the surety, he shall have an assignment of the same and an execution in his own name against his principal; and the latter provides that where there is a judgment against several sureties, and one of them shall satisfy the whole, he shall have an assignment and execution against his co-sureties for a proportionable part of the debt paid by the assignee. It will be perceived that under none of these sections is a surety entitled to an assignment and execution, unless there has been a *judgment recovered against him*. Zadok Sasscer not only had no judgment recovered against him, but he died before the suit was begun. His administrators are therefore clearly not entitled to an assignment of the judgment recovered against Ridgely, Wilson and Suit, and to execution thereon, notwithstanding they may have satisfied the said judgment. To entitle a surety to an assignment and execution against his co-sureties under section 7, it is incumbent upon him not only to satisfy the judgment, but to pay the *whole amount* of it, as has been decided by this Court at its present term, in the case of *McKnew, and others vs. Duvall*, 45 Md., 501. If George W. Wilson has *satisfied* the judgment in this case, that is, *paid the balance due upon it*, he is entitled to an execution against his prin-

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*cipal*, but *not* against his *co-sureties*, for it appears that he did not pay the *whole* debt due on the judgment. He cannot however, join with the administrators of his *co-surety*, even if they were also entitled to an assignment and execution, for the assignment is not to them *jointly*, but one-half of the judgment amounting to \$1042.06, was assigned to each of them. The joinder is therefore fatal to the attachment in this case.

It was also objected, that an attachment will not be maintained which has been levied upon funds which a person has in his hands as a public officer, and it is claimed that the attachment in this case was properly quashed for this reason. This principle was held by this Court in the case of the *Mayor and City Council of Baltimore, Garnishee of Brashears vs. Root*, 8 Md., 100 and 101. In that case Root caused an attachment to be laid upon funds in the hands of the City Register, which he held as salary of Brashears, a policeman, and while the question in that case was, whether the salary of a municipal officer was liable to attachment, it clearly appears from the opinion of the Court, that no attachment laid in the hands of a public or municipal officer would be maintained, for it quotes with apparent approval from the opinion delivered by Mr. Justice SARGENT, in the case of *Balkly vs. Eckert, et al.*, 3 Barr's Reps., 368, in which he says, that "great public inconvenience would arise if money could be thus arrested in the hands of officers, and they be made liable to all the delay, embarrassment and trouble that would ensue from being estopped in the routine of their business, compelled to appear in Court, employ counsel and answer interrogatories, as well as take care that the proceedings are regularly carried on. If a precedent of this kind were set, there seems no reason why the State or *county treasurer* or other fiscal officers of the Commonwealth, or of municipal bodies, may not be subjected to the levying of attachments, which has never



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been attempted nor supposed to come within the attachment law." Though the provisions of the attachment laws of this State are very broad, we cannot believe that they were ever intended to authorize attachments to be laid upon funds in the hands of State or municipal officers as such, and thereby impose upon them and the public service such annoyances, inconveniences and interruptions as are described by Mr. Justice SARGENT. But there is nothing to show in this case that the funds attached in his hands were held by him as *county treasurer*. If such be the fact, and the money in his hands is a surplus of the sale for taxes of the land assessed to Ridgely for non-payment of taxes, it is clear the attachment cannot be maintained if that fact be proved.

It follows from what we have said that the attachment was properly quashed, and the judgment appealed from will be affirmed.

*Judgment affirmed.*

(Decided 2nd March, 1877.)

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THOMAS DEFORD, BENJAMIN F. DEFORD and J. F. ELY vs. WILLIAM H. DRYDEN, J. C. KRAFT and L. E. WILCOX.

*Certain Prayers held not Contradictory or misleading—Province of the Jury.*

In a case where a prayer of the plaintiffs, based upon the theory of an *exchange* of certain goods, for certain notes, and a prayer of the defendants, based upon the theory of a *sale* of the goods for the notes, were both granted, it was HELD:

1st. That whether the transaction was an agreement for an exchange or a sale, was a question for the jury.

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2nd. That the prayers were not contradictory, and fairly presented the question to the jury for their decision.

Case where a prayer of the defendants, granted in connection with a prayer of the plaintiffs, was held not inconsistent therewith, and not liable to confuse or mislead the jury.

**APPEAL** from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court. The following are the prayers of the respective parties, to which special reference is made by the Court.

*Plaintiffs' Third Prayer.*—Even if the jury shall find that nothing whatever was said in the contract between the parties to this suit, in reference to recourse or non-recourse to the plaintiffs upon the paper of J. Q. Hewlett & Son, yet if the jury shall find that, in consequence and in pursuance of, and in view of the previous dealings of the parties, it was their common and tacit understanding that the Hewlett paper was to be taken without recourse, and the contract was made subject to that understanding, then the jury must accept such understanding as constituting the contract in that regard.

*Plaintiffs' Fourth Prayer.*—If the jury shall believe that the contract between the parties to the suit was substantially an agreement to exchange or trade hides upon the one part, for Hewlett's paper on the other part, and nothing whatever was said or agreed between them as to recourse or non-recourse to the plaintiffs upon such paper, or in case of its not being paid, then the failure of J. Q. Hewlett & Son, and the comparative worthlessness of their paper are no bar whatever to the right of the plaintiff to recover.

*Defendants' Second Prayer.*—If the jury shall find from the evidence that the defendants, on the 5th October, 1875, agreed to sell to the plaintiffs 500 hides at 11½ cents per pound, to average sixty pounds each, to be paid for in the promissory notes of J. Q. Hewlett & Son, at four

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months, with interest added, and that nothing was said at the time of said sale as to whether said notes were to be taken without recourse, and that defendants did not at the time of said sale, or at any time afterwards, agree to accept said notes in full payment for said hides, and to run the risk of their being paid, then the plaintiffs cannot recover in this action, if the jury shall find from the evidence that before the time for the delivery of said hides under the said agreement, said J. Q. Hewlett & Son failed and were declared bankrupt, and that the 218 hides which were delivered on October 13, 1875, were delivered before the defendants were aware of said failure, and that upon their becoming aware of said failure, the defendants demanded a return of 218 hides or payment thereof by the plaintiffs in cash, or their own notes at four months.

(Refused as offered, but granted in connection with the plaintiffs' third prayer, which states the evidence from which an agreement to take the notes of Hewlett & Son, without recourse to Deford & Sons, if they were not paid, may be inferred.)

The cause was argued before BARTOL, C. J., GRASON, MILLER and ROBINSON, J.

*John H. Thomas* and *S. Teackle Wallis*, for the appellants.

The Court erred in granting the defendants' second prayer. It was not a proper modification of the plaintiffs' third prayer, or of either of the others which the Court granted, but so entirely in conflict with them all as necessarily to confuse and mislead the jury. *Balto. & Ohio R. Co. vs. Blocher*, 27 Md., 286; *Adams vs. Capron*, 21 Md., 206; *Haney vs. Marshall*, 9 Md., 215; *Roddy vs. Finnegan*, 43 Md., 505.

An express contract may be established by *circumstantial* as well as positive proof. *Haines vs. Pearce*, 41 Md., 231.

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This prayer was therefore wrong in instructing the jury that they must find for the defendants, if nothing was said at the time of the sale, as to whether the notes were to be without recourse. The jury had a right to infer such a contract from the previous course of dealing and other circumstances. 2 *Taylor's Ev.*, 103; *B. & O. R. R. vs. Wheeler*, 18 *Md.*, 372; *Bank of Metropolis vs. New England Bank*, 1 *How.*, 234.

The latter part of it has no proper connection with the first, and is an especially unfit modification of the law of any of the defendants' prayers.

The appellants had as much right before as after the failure of J. Q. Hewlett & Son to pay for the goods in their paper. If the contract provided for such payment, the fact of the notes having subsequently become worthless did not abrogate it. *Phelan vs. Crosby*, 2 *Gill*, 462; *Thorington vs. Smith*, 8 *Wal.*, 1; *Osborn vs. Nicholson*, 13 *Wal.*, 654-9; *Lambert vs. Heath*, 15 *M. & W.*, 484; *Benjamin on Sales*, p. 309, 1st *Ed.*, and 322-3, 2nd *Ed.*, *Am. Ed.*, secs. 425, 739.

The Statute of Frauds does not require delivery of goods by the vendor, but acceptance of them by the vendee to constitute a sufficient parol contract of sale. The latter alone may exercise the option of consummating or not an incomplete contract. 17th section of Statute of Frauds; *Brown on Statute of Frauds*, 504; *Jones vs. Mechanics' Bank*, 29 *Md.*, 293.

Acceptance of part of the goods is sufficient to bind the contract as to the other part. *Hewes vs. Jordan*, 39 *Md.*, 483.

The right of stoppage *in transitu* only arises where the vendee has become insolvent, not where the paper in which he was to pay has become impaired in value, or even worthless. *Leading Cases in Mercantile Law*, 653, *mar.*; *Wilmshurst vs. Bowker*, 2 *Man. & Gr.*, 792.

If the goods were to be paid for by the notes of J. Q. Hewlett & Son without recourse, it was an agreement for

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the exchange of the one for the other. *Benjamin on Sales*, 1st Ed., 545, and 604, 2nd Ed.; *Clark vs. Mundal*, 1 Salk., 124; *Ward vs. Evans*, 2 Ld. Raymond, 928; *Bank of England vs. Newman*, 1 Ld. Raymond, 442; *Read vs. Hutchinson*, 3 Campb., 351; *Ellis vs. Wild*, 6 Mass., 321-3; *Byles on Bills*, 224, (mar. 123,) 357, (mar. 229,) and 456, (mar. 307,) 6 Am. Ed., 252, 575; 2 Am. Leading Cases, 216; *Emly vs. Lyde*, 15 East, 1-12, and note.

For these reasons none of the hypotheses mentioned in the proviso to the defendants' second prayer affected the appellants' right to recover. They are, nevertheless, put in said prayer so as to create, on the minds of the jury, the impression that they are vital to it.

*Bernard Carter*, for the appellees.

That defendants' second prayer, even without being qualified, fairly enunciated the law as laid down in Maryland, is abundantly established by the following authorities. *Patapsco Ins. Co. vs. Smith*, 6 H. & J., 166; *Glenn vs. Smith*, 2 G. & J., 509-512; *Crawford vs. Berry*, 6 G. & J., 71; *Berry vs. Griffin*, 10 Md., 27; *Tobey vs. Barber*, 2 Am. Leading Cases, 299, 300.

This prayer was drawn strictly in accordance with these views, and left the whole question properly to the jury. It was a proper instruction therefore to be given even standing alone.

But the Court, by granting this prayer in the mode it did, said as clearly as language could put it, that though such an agreement as is spoken of in defendants' prayer must be found, yet the jury need not find that there was any express agreement to this effect, but might infer such an agreement; and not only so, but might infer it even from previous dealings, and though it was only a tacit, and not an expressed agreement. What more could the appellants have asked?

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GRASON, J., delivered the opinion of the Court.

This suit was brought in the Superior Court of Baltimore City, by the appellants to recover from the appellees damages for an alleged breach of contract, in not delivering two hundred and eighty-two hides, the balance of five hundred, which the *narr.* charges and the proof shows the latter had agreed to dispose of to the former. The counsel of the respective parties filed a written agreement in the case waiving all errors in pleading, and agreeing that either party might rely upon any matter of claim to which they would be entitled, if the same had been specially declared on or pleaded. Evidence was introduced by the appellants, tending to prove that the appellees agreed to deliver to them five hundred hides of certain weight, at eleven and one-quarter cents per pound, to be paid for in the notes of Hewlett & Son, without recourse to the appellants. They offered evidence further to prove, that they had previously purchased hides of the appellees upon five or six occasions, and given in payment the paper of other firms, some of which was not endorsed by appellants, and others of which was, and that when so endorsed they had taken from the appellees a writing, by which it was agreed, that the appellants should not be held liable by reason of their said endorsement, in the event of the paper not being paid at maturity, but that they should be released from the same. They also offered proof to show that on the 13th October, the day before the hides were to be delivered under the agreement, they heard a rumor that Hewlett & Son would be protested that day, and that they immediately sent to the appellees' place of business, and procured the delivery of two hundred and eighteen hides.

The appellees offered evidence tending to prove, that they entered into the contract with the appellants, to sell them five hundred hides at the price of eleven and a quarter cents per pound, and to take the paper of Hew-

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lett & Son in payment, but that nothing was said at the time of making the agreement, or thereafter, about taking it without recourse to the appellants, that they expected the paper of Hewlett & Son to be drawn to the order of the appellants, and to be endorsed by them. They further proved that they did not know what they would have done, if the paper of Hewlett & Son had been drawn as they expected, but suppose they would have released the appellants from liability on their endorsement, by a written release similar to those they had given on previous occasions. It was further proved by them that the hides were to be delivered, under the agreement, on the 14th October, and that on the 13th, one of the appellants came to the place of business of the appellees with a large number of drays, and induced them to deliver two hundred and eighteen of the five hundred hides at that time. It further appears in proof that Hewlett & Son were protested on the 13th October, and were afterwards adjudged bankrupts, but that the appellees had no knowledge that they had been protested at the time they delivered the hides, on the afternoon of the 13th October, but heard it the next day, and refused to deliver the balance of the hides, and made a demand upon the appellants for a return of those already delivered. Upon this state of the proof the appellants offered five prayers, all of which were granted, and the appellees four, all of which were rejected as offered, but the Court granted their second in connection with the appellants' third. The judgment being for the appellees, the plaintiffs took this appeal.

It is contended that the Court erred in granting the appellees' second prayer in connection with the appellants' third, because, as they allege, it is inconsistent with and contradictory of both their third and fourth. Their fourth prayer is based upon the theory of an *exchange* or *barter* of the hides for the paper of Hewlett & Son, while the appellees' prayer, on the contrary, is based on the theory

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that the transaction between the parties constituted a *sale* of the hides, the consideration for which was to be paid in the notes of Hewlett & Son. Whether the transaction was an agreement for an *exchange*, or a *sale*, was a question for the jury to determine, and these prayers of the respective parties fairly presented that question to them for decision. We think it clear, that there is no conflict whatever between the appellees' prayer and the appellants' fourth, the former instructing the jury that if they should find that it was a contract for a *sale* of the hides, and should further find the other facts stated in the prayer, that then their verdict must be for the appellees; while the latter instructed them that, if they should find that it was an agreement for an *exchange* or *trade* of hides for Hewlett & Son's paper, then the fact that nothing was said about recourse to the plaintiffs upon such paper, and the failure of Hewlett & Son, and the comparative worthlessness of their paper, were no bar to the appellants' right to recover. These instructions are based upon entirely separate and distinct theories, are not contradictory, and can well stand together.

It was further contended that the appellees' prayer is inconsistent and in conflict with the appellants' third prayer. The appellees' prayer instructs the jury that, if they shall find a sale of the hides, as stated in the prayer, to be paid for in the notes of Hewlett & Son, and shall further find that nothing was said at the time of the sale as to whether said notes were to be taken without recourse to the appellants, and that the appellees did not, at the time of sale, or at any time afterwards, agree to accept said notes in full payment of the hides and to run the risk of their being paid, then the appellants are not entitled to recover in this action if the jury shall further find that, before the time for the delivery of the hides under the agreement, Hewlett & Son failed and were declared bankrupt, and that the two hundred and eighteen hides were



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delivered before the appellees were aware of said failure, and that upon becoming aware of said failure they demanded a return of the hides so delivered, or payment in cash, or the notes of the appellants at four months. This prayer, as we have said, was refused by the Court as an independent proposition, but was granted in connection with the appellants' third prayer. The latter contains an instruction that if nothing was said in the contract between the parties in reference to recourse or non-recourse to the appellants upon the paper of Hewlett & Son, yet, if in consequence, and in pursuance, and in view of the previous dealings of the parties, it was their common and tacit understanding that said paper was to be taken without recourse, and the contract was made subject to that understanding, the jury must accept such understanding as constituting the contract in that regard.

The Court in granting the appellees' prayer in connection with this, endorsed upon it that it was granted in connection with the plaintiffs' third prayer, "which states the evidence from which an agreement to take the notes of Hewlett & Son without recourse to Deford & Son, if they were not paid, may be inferred." The two prayers must, therefore, be taken and read together, and when so read, we think it clear that the appellants' may be fairly regarded as a modification of the instruction granted under the appellees' prayer. Taking them together, they instruct the jury that, if they find that at the time of the agreement between the parties, or afterwards, nothing was said about recourse to the appellants upon the paper of Hewlett & Son, and shall find the other facts stated in the prayer, the appellants are not entitled to recover; although notwithstanding nothing about recourse to the appellants was said at the time of making the agreement, or afterwards, if the jury shall find that in consequence, and in pursuance, and in view of the previous dealings of the parties, it was their common and tacit understanding that the

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Hewlett paper was to be taken without recourse, and the contract was made subject to that understanding, then the jury must accept such understanding as constituting the contract in that regard. This reading of the two instructions shows them to be not only consistent, but we do not think that any jury of ordinary intelligence could misunderstand, or be confused or misled by them. And especially is this so, when the Court, in granting the appellees' prayer, pointedly directed by a written endorsement on it, the attention of the jury to the appellants' third prayer, by which they were instructed that they *must* accept the common and tacit understanding of the parties that no recourse was to be had to the appellants on Hewlett's paper, if they should find such to be their common and tacit understanding from their previous dealings, even though nothing was in fact said about recourse *at the time* of the agreement or *afterwards*.

*Judgment affirmed.*

(Decided 2nd March, 1877.)

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JAMES H. WEAR vs. TRUMAN SKINNER.

*Construction of the Act of 1868, ch. 359, relating to the Statute of Limitations.*

The Act of 1868, ch. 357, provides, that "In actions hereafter brought where a party has a cause of action, of which he has been kept in ignorance by the fraud of the adverse party, the right to bring the suit shall be deemed to have first accrued at the time at which such fraud shall, or with usual and ordinary diligence might have been known or discovered." **HELD:**

1st. That it was not thereby meant that in all cases a party must commit a fraud *distinct* from, and *independent* of the original fraud, for the purpose of

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keeping the injured party in ignorance of his cause of action, nor that the mere concealment of the fraud is insufficient.

2nd. That where one practices fraud to the injury of another, the *subsequent concealment* of it from the injured party is *in itself a fraud*, and if he is thereby kept in ignorance of his cause of action, he is kept in ignorance by "the fraud of the adverse party."

In an action of deceit brought to recover damages for an alleged fraud, by which the plaintiff was induced to assign to the defendant his interest in a firm of which the two had been members; upon a plea of the Statute of Limitations and replication thereto, it was HELD:

That if the plaintiff was induced to assign to the defendant his interest in said firm by fraud practiced on him by the defendant, and such fraud was concealed from him by the defendant, whereby he was kept in ignorance of his cause of action, then his right to bring the suit must be deemed to have first accrued when such fraud was, or with usual and ordinary diligence might have been discovered.

APPEAL from the Superior Court of Baltimore City.

The case is sufficiently stated in the opinion of the Court.

*Exception.*—At the trial the plaintiff offered the three following prayers:

1. The plaintiff prays the Court to instruct the jury, that if they find from the evidence, that the plaintiff, Wear, and the defendant, Skinner, were members of the firm of Skinner, Neale & Co., and that the said Wear was not an active member of said firm, but that its business was conducted by said Skinner and Irvin Neale; and if they shall further find, that while said firm was so conducting its business, the defendant, Skinner, induced the said Wear to consent that the said firm of Skinner, Neale & Co., should become bound in any way for the accommodation of said Skinner, upon a note or notes made by said Skinner, for money alleged by said Skinner, to be due from him to other persons as mentioned in evidence; and if they shall further find, that said Skinner, in order to procure said endorsement of, or other use of the name

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of Skinner, Neale & Co. on said note or notes, represented that the persons to whom said money was alleged to be due, had demanded that he, the said Skinner, should secure the payment of the same, by giving his note or notes therefor, with an endorser or surety on said note or notes; and if they shall further find, that the representations by which said Skinner procured such endorsement, or other use of the name of Skinner, Neale & Co. on such note or notes were untrue, then the procurement by said Skinner, of such use of the name of Skinner, Neale & Co. on said note or notes, was a fraud upon said Wear.

2. If the jury shall find the facts stated in the plaintiff's first prayer, and shall further find that said Skinner, (after so procuring the consent of said Wear to the use of the name of Skinner, Neale & Co., on the note or notes of said Skinner, as mentioned in said first prayer, for the accommodation of said Skinner,) made use of the obligation which said Wear had contracted, by such use of the name of Skinner, Neale & Company on said note or notes, for the purpose of compelling said Wear to assign to him, the said Skinner, the interest of said Wear in the firm of Skinner, Neale & Co., by threatening said Wear, that unless he, the said Wear, would make such assignment, and accept in payment therefor, the note of Wm. G. Wear, offered in evidence, he, the said Skinner, would suffer his note or notes, on which the name of Skinner, Neale & Co. had so been procured to be used, to be protested for non-payment, so as to make said Wear liable as a member of Skinner, Neale & Co., for the payment of said note or notes. And if they shall further find that said Wear was induced to make the assignment to said Skinner, of his, the said Wear's interest in Skinner, Neale & Co., by such threat of said Skinner, and that said Wear but for such threat, and but for the fear on his part, caused by the acts and declarations of said Skinner, would not have assigned his interest in

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said firm of Skinner, Neale & Co. to said Skinner, and would not have accepted the note of W. G. Wear in payment for said interest, then the assignment of the interest of said Wear, in said firm of Skinner, Neale & Co., was fraudulently procured by said Skinner, and the plaintiff is entitled to recover such loss as the jury may find that he has sustained, by reason of said assignment of his said interest in the firm of Skinner, Neale & Co., provided the jury shall find the facts stated in the plaintiff's third prayer.

3. If the jury shall find the facts stated in the two preceding prayers of the plaintiff, being his first and second prayers, and shall further find that the use of the name of Skinner, Neale & Co. on the note or notes of the said Skinner, was procured by the said Skinner, in the manner set forth in the first prayer, and that the said Skinner made use of the obligation incurred by said Wear, by such use of the name of Skinner, Neale & Co. on said note or notes, in the manner set forth in the plaintiff's second prayer; and if the jury shall further find that the plaintiff, at the time he consented to allow the name of Skinner, Neale & Co., to be used in any manner as security for the payment of the note or notes of said Skinner, as set forth in the plaintiff's first prayer, believed and acted upon the representations of said Skinner, by which said Skinner procured the use of the name of Skinner, Neale & Co. on said notes, as mentioned in the plaintiff's first prayer; and if the jury shall further find, that the plaintiff was prevented by the acts of said Skinner, done for the purpose, from discovering that the said use of the name of Skinner, Neale & Co. on said note or notes of said Skinner, had been procured by said Skinner in the manner set forth in the plaintiff's first prayer, until within three years before the institution of this suit, and until within three years from the time, when the plaintiff by usual and ordinary diligence under the circumstances of the case,

might have ascertained said fraud, then the Statute of Limitations is no bar to the plaintiff's recovery.

And the defendant offered the following prayer.

1. The defendant by his counsel, prays the Court to instruct the jury, that the plaintiff has offered no evidence legally sufficient to maintain his replication to the defendant's second plea, and their verdict must therefore be for the defendant.

And the defendant offered four other prayers which were afterwards withdrawn, and are consequently omitted, and also offered the following exception to the plaintiff's prayers.

The defendant excepts to all of the prayers of the plaintiff, because among other reasons, there is no evidence in the cause to sustain the same or any of them.

The Court, (DOBBIN, J.,) granted the defendant's first prayer, and refused all the prayers of the plaintiff, assigning as the reason for such refusal the granting of the defendant's first prayer, and the withdrawal of the cause from the jury by the granting of said prayer. The plaintiff excepted.

The jury rendered a verdict for the defendant, and judgment was entered accordingly. The plaintiff appealed.

The cause was argued before BARTOL, C. J., STEWART, BOWIE, GRASON, MILLER, ALVEY and ROBINSON, J.

*Charles Marshall*, for the appellant.

The Court below decided that although the cause of action itself arise from fraud practiced by the defendant upon the plaintiff, and that fraud be not found out by the plaintiff until within three years before the institution of the suit, yet, unless there be evidence of *some other distinct fraud* whereby knowledge of the *right of action for fraud* was concealed from the plaintiff, the replication is not supported.

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It is respectfully submitted that this is not the correct rule, and that if, as in this case, the right of action arises from the fraud of the defendant, such fraud may at one and the same time, give a right to sue, *and conceal that right from the party entitled to it*, so as to support the replication, without any other or different act of fraudulent concealment by the defendant.

This would seem to be right if we regard the reason of the common law rule in those Courts that permitted such a replication at law, as well as the reason of our Statute.

A right of action for fraud, pre-supposes a successful fraud, and a successful fraud assumes that it is *concealed* from the victim of it, not merely *unknown* to him.

A man cannot defraud another without concealment or deception of some kind. It may be said of fraud as of art; "*fraus est et celare fraudem.*"

The reason of the rule of law and of the Statute is, that it would be most unjust and subversive of good morals, to permit a man to defend himself on the ground that he had not been sued in time, when he had, by his own fraud, prevented his victim from knowing that he was liable to be sued.

If then the cause of action itself be for fraud, and no such cause of action could arise except by the success of the defendant in deceiving the plaintiff, and there can be no successful deception without concealment, it is difficult to see why a new and additional act of fraud to continue the concealment should be required to sustain the replication. *Bailey vs. Glover*, 21 *Wallace*, 342; *Massachusetts Turnpike Co. vs. Field*, 3 *Mass.*, 201; *Homer vs. Fish*, 1 *Pickering*, 435; *Welles vs. Fish*, 3 *Pick.*, 74; *Sherwood vs. Sutton*, 5 *Mason*, 143; *Booth vs. Lord Warrington*, 4 *Brown's Parliamentary Cases*, 163; *South Sea Company vs. Wymondsell*, 3 *Peere Williams*, 143; *Hovenden vs. Lord Annesley*, 2 *Sch. & Lef.*, 634; *Stearns vs. Page*, 7 *Howard*, 819; *Moore vs. Greene*, 19 *Howard*, 69; *Snod-*

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*grass vs. Bank, &c.*, 25 *Ala.*, 161; *Gregg vs. Sayre's Lessee*, 11 *Curtis*, 82; *Moss vs. Riddle & Co.*, 2 *Curtis*, 290.

*S. T. Wallis*, for the appellee.

The fraud allowed by the Act of 1868, to be set up in bar of limitations must be a specific, substantive fraud, apart from, and superadded to, the fraud which is the cause of action. It must be a fraud practiced after the cause of action has arisen, and for the purpose of keeping the injured party from finding out that he has such cause of action.

This is the language of the Act properly construed, and the opposite construction would be equivalent to ruling, that the Statute of Limitations does not apply to cases of fraud. *Rice vs. Burt*, 4 *Cushing*, 208; *Smith vs. Bishop*, 9 *Vermont*, 110-115; *Clark vs. Hougham*, 2 *Barn. & Creswell*, 149, (9 *E. C. L.*, 48;) *Granger vs. George*, 5 *Barn. & Cres.*, 149-152, (11 *E. C. L.*, 185;) *Stanley vs. Stanton*, 36 *Indiana*, 449; and see *Clarke's Adm'r vs. Marriott's Adm'r*, 9 *Gill*, 338, adopting 2 *Greenleaf's Evidence*, 448.

Upon any construction of the Act of 1868, the *onus* is on appellant to prove the fraud averred in the replication, and that he used usual and ordinary diligence to find it out. This *onus* is strictly enforced and required. *Stearne vs. Page*, 7 *Howard*, 819-829; 2 *Greenleaf's Evidence*, sec. 488.

ROBINSON, J., delivered the opinion of the Court.

This is an action for *deceit* brought by the appellant against the appellee, to recover damages for an alleged fraud, by which the former was induced to assign to the latter, his interest in the firm of Skinner, Neale & Co., of which they had both been members

The defendant pleaded *non cul*, and the Statute of Limitations. Issue was joined on the plea of not guilty, and to the plea of the Statute, the plaintiff replied:



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“That he was kept in ignorance by the fraud of the defendant for a long time of the cause of action, which he had against the defendant, and that he brought his action within three years from the time at which he could, with usual and ordinary diligence, have discovered the fraud.”

Issue was joined on the replication, and the Court below rejected the several prayers offered by the plaintiff, and instructed the jury that he had offered no evidence *legally sufficient* to maintain the replication, and their verdict must be for the defendant.

We understood the appellee to contend, that although the plaintiff was injured by fraud practiced on the part of the defendant, and such fraud was not discovered by him within three years before the institution of this suit, yet in order to support the replication, it was necessary to prove *some other distinct fraud* on the part of the defendant, whereby the plaintiff was kept in ignorance of his cause of action; and that the *mere concealment of the original fraud from the Plaintiff will not be sufficient*.

The replication was filed under the Act of 1868, ch. 357, which provides that—

“In all actions to be hereafter brought where a party has a cause of action, of which he has been kept in ignorance by the fraud of the adverse party, the right to bring the suit shall be deemed to have first accrued, at the time at which such fraud shall or with usual and ordinary diligence might have been known or discovered.” Here then is a remedial Act, passed for the purpose of enabling parties in *actions at law*, to set up the fraud of the defendant, in order to avoid a plea of limitations, and if there be any difficulty in its construction, an examination of the law on the subject, as recognized by Courts of equity and Courts of law at the time the Act was passed, may aid us in determining what the Legislature meant.

And to this end, we deem it unnecessary to review the many cases in which the subject has been considered by

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Courts of equity, for we think one may safely say, it is well settled by such Courts, that where a party has been injured by the fraud of another, and *such fraud is concealed*, or is of *such character as to conceal itself*, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run, until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. *Booth vs. Lord Warrington*, 4 *Brown's Parliamentary Cases*, 163; *South Sea Company vs. Wymondsell*, 3 *Peere Williams*, 143; *Hovenden vs. Lord Annesley*, 2 *Schoales & Lefroy*, 634; *Sherwood vs. Sutton*, 5 *Mason*, 143; 2 *Swanst.*, 62; *Petre vs. Petre*, 1 *Drewry*, 393; *Langley vs. Fisher*, 9 *Beav.*, 90; *Lewis vs. Thomas*, 3 *Hare*, 26; *Bailey vs. Glover*, 21 *Wallace*, *U. S. Rep.*, 346. And this is the rule too, when such Courts are dealing with legal demands, in regard to which they obey strictly the very terms of the Statute of Limitations.

Whether a party can rely upon the fraud of the defendant, in an *action at law*, to avoid the operation of the statute, is a question in regard to which there is some conflict of decision in this country. Some Courts hold, that the equitable principles upon which fraud is allowed in equity in such cases, are not applicable in actions at law. Others, on the other hand, maintain that the Statute of Limitations was intended to suppress, and not to be used as a shield for fraud, and that whenever a party is injured by the fraud of another, and such fraud is concealed from him, the statute does not begin to run until he has, or might with ordinary diligence have discovered the fraud. Such cases, they hold are not within the meaning and operation of the statute, and the injured party may rely upon fraud in a Court of law as well as in a Court of equity. *Turnpike Co. vs. Field*, 3 *Mass.*, 201; *Welles vs.*

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*Fish*, 3 *Pick.*, 74; *Jones vs. Conoway*, 4 *Yeates*, 109; ~~*Reek*~~ *vs. Barr*, 1 *Watts*, 110; *Pennock vs. Freeman, Id.*, 401; *Mitchell vs. Thompson*, 1 *McLean*, 96; *Carr vs. Hilton*, 1 *Curtis*, 390; *Bowman vs. Sanborn*, 18 *New Hamp.*, 208; *Cole vs. McGlarthy*, 9 *Greenleaf*, 131; *Morton vs. Chandler*, 8 *Greenleaf*, 9; *McDowell vs. Young*, 12 *Serg. & Rawle*, 128; ~~*Reesh*~~ *vs. Barr*, 1 *Watts*, 110; *Harrisburgh Bank vs. Foster*, 8 *Watts*, 12.

RUSH.

It has been questioned whether the English cases go to the extent of deciding, that a party may reply fraud to a plea of limitations in an action at law, and although the question was not directly raised by the pleadings in *Bree vs. Holbach*, *Doug.*, 655; *Clarke vs. Hougham*, 3 *Dowling & Ryland*, 322, and *Granger vs. Granger*, 5 *Barnwall & Creswell*, 149, yet it is clear from what was said by the several Judges in these cases, that a replication of fraud would have been sufficient.

LORD MANSFIELD said: "There may be cases too, which fraud will take out of the Statute of Limitations." *Doug.*, 654.

BAYLEY, J., "The question how far fraud may prevent the operation of the Statute of Limitations, does not properly arise in this case. In order to take advantage of fraud, there should have been a special replication."

BEST, J., "To the next question, it has been answered that fraud prevents the operation of the Statute of Limitations. It is not necessary to decide that now, but I think that I would have done so, had the replication raised the point." *Clarke vs. Hougham*, 2 *B. & C.*, 149.

In this State, it was held in the case of the *Negro Franklin*, 8 *Gill*, 331; that fraud could not be replied to a plea of limitations in an action at law, and it is obvious we think, that the Act of 1868, was passed for the purpose of enabling parties to set up the fraud of the defendant in a Court of law as well as in a Court of equity.

Unless then the terms of the Act plainly show a contrary intention, it is but fair to presume, the Legislature

meant that the nature and character of the fraud which a party was thus allowed to plead, should be governed by the well settled rules of law on the subject, as recognized by Courts of equity and Courts of law, at the time when the Act was passed. The inquiry then is, whether the language of the Act, requires or justifies a contrary construction?

It says, it is true, "cause of action of which" a party "has been kept in ignorance by the fraud of the adverse party." Does this mean, however, that in all cases, a party must commit a fraud *distinct* from, and *independent* of the *original fraud*, for the purpose of keeping the injured party in ignorance of his cause of action, and that the *mere concealment* of the fraud is insufficient? We think not. Where one practices fraud to the injury of another, the *subsequent concealment* of it from the injured party is *in itself a fraud*, and if he is thereby kept in ignorance of his cause of action, he is kept in ignorance by the "fraud of the adverse party."

The principle upon which it has been held that cases of this kind, are not within the Statute of Limitations, is that it would not only be subversive of good morals, but contrary to the plainest principles of justice, to permit one practicing a fraud and then concealing it, to plead the statute, when in fact, the injured party did not know, and could not with reasonable diligence have discovered the fraud. And to require the plaintiff in all cases to prove a distinct and independent fraud in addition to the original fraud, whereby a party is injured, and that the subsequent concealment of the fraud is insufficient, would in a great measure defeat what we understand the Legislature meant. For if the narrow construction contended for be correct, and a party succeeds in getting the property of another, through fraudulent representations, and concealed the fraud until limitations operates as a bar to the action, the injured party would be without remedy, although he did not

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know of the fraud and could not by reasonable diligence, have discovered it. We cannot suppose the Legislature intended thus to restrict the operation of a *remedial statute*, nor do we think the terms of it require such a construction.

And when it is said in 2 *Greenleaf Evidence*, sec. 448, that it "must be alleged or proved not only that the plaintiff did not know of the existence of his cause of action, but the defendant had practiced fraud in order to prevent the plaintiff from obtaining knowledge at an earlier period," we do not understand the author as meaning that the subsequent concealment of the fraud, whereby the injured party was kept in ignorance of his cause of action, would not be sufficient.

On the contrary, the cases cited in support of the text, clearly show the author did not mean to be understood in the sense contended for by the appellee.

In the case of *Sherwood vs. Sutton*, 5 *Mason*, 143, referred to by Greenleaf, Judge STORY says:

"The point is not whether mere ignorance of the fact on the part of the plaintiff ought to remove *the bar*, but whether it is ignorance, resulting from the fraudulent concealment of the fact by the defendant, ought to have that effect."

And so in *Massachusetts Turnpike Co. vs. Field*, 3 *Mass. Rep.*, 201, PARSONS, C. J., says:

"The delay in bringing this suit, is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud."

These and other cases cited in support of the text, show that is not liable to the construction now placed upon it by the appellee. *Bree vs. Holbeck*, 5 *Doug.*, 654; *Clark*

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*vs. Hougham*, 2 B. & C., 149; *Welles vs. Fish*, 3 Pick., 74; *Jones vs. Conoway*, 4 Yeates, 109; *Troup vs. Smith*, 20 John., 40.

If then the plaintiff was induced to assign to the defendant, his interest in the firm of Skinner, Neale & Co., by fraud practiced upon him by the defendant, and such fraud was concealed from him by the defendant, whereby he was kept in ignorance of his cause of action, then in the language of the Act of 1858, his right to bring the suit, shall be deemed to have first accrued at the time when such fraud shall or with usual and ordinary diligence might have been discovered.

Such being our construction of the Act of 1868, the only remaining question is, whether the Court was right in taking the case from the jury. In so doing, the Court said, admitting all the evidence offered by the plaintiff to be true, and adding thereto, every inference that might be fairly and legitimately deduced therefrom, it was insufficient to support the replication.

We have carefully examined the proof to be found in the record, and without intimating an opinion in regard to the weight of it, we think it was legally sufficient to warrant the Court in submitting the case to the finding of the jury.

We see no objection to the plaintiff's first prayer, but the second does not, in our judgment, submit to the jury fully and distinctly, all the facts relied on to prove the alleged fraud. We do not understand the plaintiff as contending, that the manner in which the notes were obtained by the defendant, and the subsequent threat to have them protested, were in themselves sufficient, but that taken in connection with the alleged false representations that the notes had been sent by the holders thereof to the bank for collection, and that they would be protested in case of non-payment, together with other facts offered in evidence, were sufficient to prove a plan deliberately and fraudulently

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conceived by the defendant, and successfully carried into execution, whereby the plaintiff was induced to transfer his interest in the firm of Skinner, Neale & Co. to the defendant.

Being of opinion that the Court erred in refusing the plaintiff's first prayer, and granting the first prayer of the defendant, the judgment will be reversed and a new trial awarded.

*Judgment reversed, and  
new trial awarded.*

(Decided 2nd March, 1877.)

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JAMES BULLOCK and DAVID GLANDING vs. ISAAC  
BERGMAN.

*Award—Case of arbitrators going outside the terms of submission—That which will enable the Court to separate the good from the bad must appear on the face of the award—Speculative damages.*

J. B. having a contract with the Board of Directors of the Penitentiary, under which he was entitled to carry on the manufacture of harness at that institution, entered into an agreement with G. and B. to unite with them in partnership in carrying on the business. During the partnership, G. and B. filed a bill against J. B. charging him with a violation of his agreement, and asking for a dissolution, account, &c. Whereupon an agreement was entered into for the settlement of all matters in controversy between them, by which among other things, it was agreed, "that all matters appertaining to, or connected with the business in which the said parties have been engaged together in the Penitentiary, under the contract with the Directors thereof, and also under the contract between themselves," should be referred to two arbitrators with power to choose an umpire in case of disagreement,

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"the said arbitrators to have access to the books and papers belonging to the concern, and to ascertain and determine finally the precise interest of each party in business." Under this reference an award was made directing, that "*J. B. pay to G. as the portion of the profits due to him, and of the losses by him sustained by the neglect and refusal of J. B. to keep and abide by his contract with the said G., in relation to the said business conducted by them in the Penitentiary, the sum of \$3967.28; and for the like contract as the profits and damages justly owing, and arising out of the same, that the said J. B. pay to B. as owing to and sustained by him the sum of \$3850.78.*" On a bill filed by J. B. to have said award set aside. **Held:**

1st That the award embraced matters not within the terms of the submission.

2nd. That the arbitrators were not authorized to decide upon any claims of damages made by G. and B., based upon matters not included in the partnership transactions and business.

The proof showed that the arbitrators took into consideration the claims made by G. and B., for alleged damages resulting to them from discontinuing the business; and included in the sums awarded to G. and B. an estimate of the profits, which they supposed might have been made by G. and B. if the business had been continued till the contract of J. B. with the Directors of the Penitentiary would have terminated. **Held:**

1st. That damages estimated upon such a basis, are altogether speculative and of too uncertain a character to be sanctioned by the Courts.

2nd. That the subject-matter out of which they are supposed to have arisen, was not one submitted to the arbitrators, and they exceeded their authority in making it the ground of their award.

3rd. That while Courts regard awards with favor, and every intendment is made for their support, yet it is well settled, that they cannot be supported if the matters awarded are not within the terms of the submission.

4th. That the parties are not bound except by their agreement, and a decision by the arbitrators of any matter not referred to them, is beyond their authority, and vitiates the award, unless that part of it which is outside of the submission can be separated from the rest.

5th. That in this case it is impossible to make the separation, the sum awarded to G. and B. being *in solido*, and there being nothing on the face of the award to show what part of those sums consisted of damages awarded as before stated.

6th. That evidence was inadmissible to show in what manner the arbitrators reached their conclusion and the items making up the gross sums awarded.



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7th. That the separability of the bad from the good must be apparent on the face of the award.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The following statement is the one referred to in the opinion of the Court, as "the paper made out by the witness Navy."

*Respondent's Exhibit G. W. N.*—(Filed with Commission.)

Total profit to Decr. 1st, 1873, after deducting  
full amount charged to profit and loss..... \$7,999 37

Of which amount D. Glanding was entitled to  
one-third, say..... \$2,666 45  
Less amount drawn by him..... 1,350 00

Amount remaining due D. Glanding, Decr. ,  
1, 1873..... \$1,316 45

Of said profit, James Bullock was entitled to  
one-third, say..... \$2,666 45  
Less amount drawn by him..... 1,466 50

Amount remaining due James Bullock, Decr.  
1, 1873..... \$1,199 95

On the sales subsequent to Nov. 30, 1873, at the same ratio of profit as for the preceding period of their business, the profit should have been on the \$11,000 sold, say \$1952.50.

One-third of which would be due D. Glanding,  
say..... \$650 83  
One-third of which would be due James Bullock,  
say..... 650 83

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Damages for not carrying out contract by Isaac Bergman:

Say to D. Glanding.....\$2,000 00  
 " James Bullock..... 2,000 00

Attest:—G. W. NAVY, Clerk.

The cause was argued before BARTOL, C. J., STEWART, GRASON, ALVEY and ROBINSON, J.

*John S. Campbell* and *W. H. Cowan*, for the appellants.

The Courts make every intendment in favor of the award, and none against it. *Caton vs. McTavish*, 10 *Gill & Johns.*, 193.

The submission empowered the arbitrators to decide on all questions considered by them. The construction of the submission will not be strict, but it will be liberal to meet the object for which it was made. *Md. & Del. R. R. Co. vs. Porter*, 19 *Md.*, 458; *Garritee vs. Carter*, 16 *Md.*, 309.

If an award be good in part, it will not be set aside, provided the good is not so blended with the bad, as to make the two inseparable. *Hartland vs. Henry*, 44 *Vt.* 593; *Garritee vs. Carter*, 16 *Md.*, 309; *Bullitt vs. Musgrave*, 3 *Gill*, 31; *McCormack vs. Gray*, 13 *How. (S. C.)* 26.

In this case the account filed with the award, though the award does not refer to it, exhibits the items which enter into the account, and that they are separate and distinct. If some of the items be good, they can be retained, and if some be bad, they can be rejected without interfering with each other. *Burrows vs. Guthrie*, 61 *Ill.*, 70; *McCormack vs. Gray*, 13 *How. (S. C.)* 26; 26 *Verm.*, 345; 5 *Wall.*, 430; 17 *How.*, 349; 27 *Md.*, 417.

The damages given for the violation of his contract, by I. Bergman, were not too remote and speculative. In giving damages, the Courts of law follow as certain a rule

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as the nature of the case admits. *Brown & Otto vs. Werner*, 40 *Md.*, 15.

A Court may reform an award by striking out credits, &c. If the Court can be informed by testimony in the award itself, or by testimony *aliunde* of unjust charges or allowances, that would amount to fraud, it will correct them, and confirm the award as to the balance. *Moore vs. Luckless*, 20 *Gratt. (Va.)* 160; *Rawson vs. Hull*, 56 *Me.*, 142.

*I. Rayner* and *Wm. F. Frick*, for the appellee.

It is clear that in the award, the arbitrators have proceeded beyond the articles of submission, and determined upon matters not left to their judgment.

An examination of said articles, in connection with the bill of complaint which was filed by said Glanding and Bullock in the Circuit Court, and which was dismissed for the purpose of leaving the matters contained in it to arbitration, will satisfy any one, that the only subject to be determined upon by said arbitrators, was the adjustment of the books and the balancing of the accounts between the parties; that it was not within their province to enquire into the matter whether or not Glanding and Bullock had suffered any damages by the failure of Bergman to continue the business, and when they did so, they proceeded beyond their jurisdiction.

If any claim for breach of contract by Bergman in fact existed, and the arbitrators had authority to assess damages for any such alleged breach, (both of which propositions are denied,) nevertheless, the arbitrators had no right to adopt a *measure* of damages, which the law unequivocally repudiates in all cases as improper and unjust. They confessedly made up an award based upon an estimate of speculative profits which might have accrued, if Bergman had placed more capital in his business and enlarged it, and of like prospective profits which *might* have accrued,

if the business had been continued with such capital, after the period when it actually ceased. The determination of one arbitrator and the umpire to enter upon this unauthorized and illegal inquiry, caused the withdrawal of the other arbitrator; and the persistency of the former in entering upon this speculative estimate, *ex parte*, and making what they were pleased to call an award upon it, after their colleague had retired, and without any notice to him or any notice to Bergman, in conformity with the other arbitrator's request, certainly vitiates the so-called award. *Wilson vs. Boor*, 40 Md., 483; *Young, &c. vs. Reynolds, et al.*, 4 Md., 375; *Bullitt vs. Musgrave*, 3 Gill, 31; *Emory, et al. vs. Owings*, 7 Gill, 488; *Morse on Arbitration and Awards*, 116.

If the Court is of the opinion that the arbitrators have exceeded the authority vested in them by the articles of submission, then clearly, as stated by the Circuit Court in its opinion, the good part of the award cannot be separated from the bad, for the authorities are clear that one part of an award cannot be upheld and another part vacated, *unless the two parts are independently set out in the award, and are separated upon the face of the award itself*. It is only necessary to glance at the award in this case to see that the sum which was found against Bergman is stated collectively; that there is no separation of the two elements which make up the same, namely, *the indebtedness from the books and the claim for damages*; and that this is an apparent and fatal defect which cannot be helped by evidence, *dehors* the award itself. *Morse on Arbitration*, 313, 470, 474, 477.

BARTOL, C. J., delivered the opinion of the Court.

The bill of complaint in this case was filed by the appellee for the purpose of setting aside an award. It appears from the record that in 1872, the appellee had a contract with the Board of Directors of the Penitentiary,

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under which he was entitled to carry on the manufacture of harness in that institution; and on the 15th day of November of that year, he entered into a written agreement with the appellants, to unite with them in partnership in carrying on the business.

The partnership continued till March 6th 1874, when the appellants filed a bill of complaint against the appellee, charging him with having violated his agreement, and praying for a dissolution of the firm, an account of the affairs of the partnership, the appointment of a receiver, and for an injunction.

On the 12th day of March 1874, the parties entered into the following agreement:

“It is agreed this 12th day of March 1874 between the undersigned Isaac Bergman, David Glanding and James Bullock, that all matters of controversy between them up to this date be settled by them; Isaac Bergman agrees to sell out his contract with the Penitentiary, and the tools, fixtures and machinery, used in the same at the Penitentiary, to any person whom the said Glanding and Bullock can succeed in getting to take his place, at such sum as may be fixed by two disinterested appraisers, to be selected by the (said) Bergman and purchaser, with right to them to choose an umpire in case they disagree.

“And it is further agreed that all matters appertaining to, or connected with the business in which the said parties have been engaged together in the Penitentiary, under the contract with the Directors thereof, and also under the contract between themselves, shall be referred at once to two arbitrators, one to be chosen by said Isaac Bergman, and the other by the said Glanding and Bullock, with power to them, the said arbitrators, to choose an umpire in case of disagreement, the said arbitrators to be named by the parties aforesaid, on or before three o'clock to-morrow; the said arbitrators to have access to all books and papers belonging to the concern, and to ascertain and determine

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finally the precise interest of each party in business. It is understood that this agreement has nothing to do with any claim or controversy, as between Glanding and Bullock and the firm of P. Bergman & Son.

(Signed,)

ISAAC BERGMAN,  
DAVID GLANDING,  
JAMES BULLOCK."

Under this agreement of reference, arbitrators were appointed, the appellants choosing *Thomas Daley*, and the appellee choosing *Marcus S. Hess*, who accepted the appointment; at the first meeting, the arbitrators chose *Henry Seim* as umpire. During the proceedings by the arbitrators, Hess withdrew from the arbitration. The other two arbitrators *Daley* and *Seim* proceeded with their investigations and made an award, signed and sealed by them, in which Hess did not unite, he having taken no part in the proceedings after his withdrawal.

Several objections are made to the award, one of which is "*that the arbitrators proceeded beyond the articles of submission and determined upon matters not left to their judgment.*" As we are of opinion that this objection is well taken, and is fatal to the validity of the award, it is unnecessary for us to notice the other objections urged by the appellee, and argued by the counsel.

The award adjudges that Isaac Bergman owes and is indebted to James Bullock in the sum of \$3850.78, and to David Glanding in the sum of \$3967.28,—and awards that "*Isaac Bergman pay to David Glanding, as the portion of the profits due to him, and of the losses by him sustained by the neglect and refusal of I. Bergman to keep and abide by his contract with said Glanding, in relation to the said business conducted by them in the Penitentiary, the sum of \$3967.28; and for the like contract, as the profits and damages justly owing and arising out of the same, that the said Isaac Bergman pay to James Bullock, as owing to and sustained by him, the sum of \$3850.78.*"

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It is manifest from an examination of the agreement of reference, that this award embraces matters not within the terms of the submission. By the agreement the parties referred "*all the matters appertaining to or connected with the business in which they had been engaged together in the Penitentiary under contract with the Directors thereof, also under the contract between themselves,*" \* \* \* \* "the said arbitrators are to have access to all books and papers belonging to the concern, and to ascertain and determine finally the precise interest of each party in business." The reference was of the partnership affairs, with power to the arbitrators to examine and adjust the accounts between the partners, and to determine their respective rights and liabilities to each other with respect to the property and business of the firm. They were not authorized to decide upon any claims of damages made by the appellant, based upon matters not included in the partnership transactions and business.

The proof shows that the arbitrators took into consideration the claims made by the appellants for alleged damages resulting to them from discontinuing the business; and included in the sums awarded to the appellants, an estimate of the profits which they suppose might have been made by the appellants, if the business had been continued till the contract of Bergman with the Directors of the Penitentiary would have terminated. Damages estimated upon such a basis, are altogether speculative, and of too uncertain a character to be sanctioned by the Courts. But apart from this consideration, the subject-matter out of which they are supposed to have arisen, was not one submitted to the arbitrators, and they exceeded their authority in making it the ground of their award.

While Courts regard awards with favor, and every intendment is made for their support, as was said in *Caton vs. McTavish*, 10 G. & J., 193; *Ebert's Ex'rs vs. Ebert's Adm'rs*, 5 Md., 353, and in *Roloson vs. Carson*, 8

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*Md.*, 208. Yet it is well settled that they cannot be supported, if the matters awarded are not within the terms of the submission; the parties are not bound except by their agreement, and a decision by the arbitrators of any matter not referred to them is beyond their authority; and vitiates the award, unless that part of it which is outside of the submission can be separated from the rest.

In *Caton vs. McTavish*, the Court said "The principle is well settled that where the matters awarded are independent and distinct from each other, those which are within the submission are good, and not vitiated or contaminated by those which are without it." 10 *G. & J.*, 216.

In this case it is impossible to make the separation. The sums awarded to the appellants are *in solido*; and on the face of the award there is nothing to show what part of those sums consisted of damages awarded to the appellants, as before stated. An attempt has been made by the appellants, to show by evidence taken before the arbitrators, in what manner they reached their conclusion, and the items making up the gross sums awarded; and for this purpose the paper made out by the witness, *Navy*, was produced. But it is clear upon the authorities that such evidence is inadmissible for that purpose.

Lord C. J. DENMAN said in *Tomlin vs. Mayor of Fordwich*, 31 *E. C. L.*, 306:

"I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other, and each may be varied by the view which he takes of the whole." "This observation" says Russell, "is worthy of attention since it seems to embody the principle on which the Courts will act at the present day, when they are called upon to decide whether an award clearly bad in part, can be separated as to the remainder, for it must often happen that a direction perfectly separable as far as the gram-



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matical construction of the award is concerned, is the ground on which the arbitrator has proceeded in making some equivalent provision in favor of the other party." *Russell's Arbitrator*, 325, (63 *L. Lib.*, 261.)

It is settled that the separability of the bad from the good, must be apparent on the face of the award. *Adams vs. Adams*, 8 *N. H.*, 82; *Dalrymple vs. Whittingham*, 26 *Verm.*, 345, 354; *De Groot vs. U. States*, 5 *Wallace*, 420; *Cromwell vs. Owings*, 6 *H. & J.*, 10; *Garritee vs. Carter*, 16 *Md.*, 309, 313.

Here, as before said, that is not practicable. For the reasons stated we think the decision of the Circuit Court was correct and the decree will be affirmed.

*Decree affirmed.*

(Decided 7th March, 1877.)

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PATRICK HANRATHY vs. THE NORTHERN CENTRAL  
RAILWAY COMPANY.

*Master and Servant—Liability of a Railway Company for injuries to an Employé resulting from the negligence of a Co-employé—Sufficiency of Evidence.*

A plaintiff suing a railroad company to recover damages for injuries caused by a steam hammer of the company, while he was in said company's employ, cannot recover, although the injuries were caused by the defective condition of the hammer, or by negligence of the agents of the defendant, or by both combined, without showing also that the defendant did not use reasonable care in procuring for its operations sound machinery, and faithful and competent employés.

And where in such action there was no evidence that the defendant was negligent in failing to employ competent and faithful employés, or in not pro-

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curing sound and sufficient machinery, but on the contrary the proof was uncontradicted, that B., the person in immediate charge of the hammer, and engaged in working it, and I. the foreman of the shop, were both first-class men for their positions, and that the hammer was of approved construction, and the best kind of hammer made when it was placed in the shop; although some evidence was offered by the plaintiff tending to prove, that the accident was caused by the steam hammer not being in good order and condition at the time, or by the negligence of B., it was **Held**:

1st. That the jury were properly instructed that the plaintiff had offered no evidence to show that such reasonable care was not used by the defendant.

2nd. That B. was a fellow-servant engaged in a common employment with the plaintiff, and the defendant would not be liable to the plaintiff for the consequences of his negligence, even if it had actually caused the accident.

3rd. That this principle applies, whether the alleged negligence of B. consisted in want of care in the management of the steam hammer, or in failing to report to the foreman that it was not in good order and needed repair.

The plaintiff testified that he was employed to wheel scrap iron from the yard into the shop, where the hammer was, and to fill the tank with water and to bring ice, and that the first time he worked at the hammer was on the morning of the accident. **Held**:

That this did not affect his right to recover, inasmuch as it appeared from his own testimony, that he had been at work there for two months, made no objection when he was called on to work at the hammer, and voluntarily undertook that employment.

**APPEAL** from the Superior Court of Baltimore City.

The case is sufficiently stated in the opinion of the Court.

*Exception.*—The plaintiff offered the six following prayers:

1. If the jury shall believe from the evidence, that the plaintiff entered the service of the Northern Central Railway Company, and whilst in such service, the said railway company did not use reasonable care to avoid exposing its servant, the plaintiff in this case, to extraordinary risk, which could not have been reasonably anticipated by the said plaintiff at the time of the contract of said service, but that plaintiff was injured through the want of such

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reasonable care on the part of the defendant, then the plaintiff is entitled to recover; provided they shall also find, that the said plaintiff did not contribute to his own injury by negligence or carelessness on his part.

2. If from the evidence the jury find, that the steam hammer mentioned by the witnesses, was defective and insufficient at the time of the accident, and that such defective condition of the hammer was well known to the defendant, but unknown to the plaintiff, and was the cause of the injury sued for, and that the defendant did not use reasonable care in procuring said hammer or in repairing the same, after such knowledge of its defectiveness, or in procuring faithful and competent co-employés of the plaintiff, whose duty it was to keep said hammer in good condition and repair, then the plaintiff is entitled to recover, unless they should further find that at the time of said injury, the plaintiff was not using ordinary care, or that he contributed to said injury by the want of ordinary care and prudence on his part.

3. If from the evidence, the jury find that the plaintiff was employed by the defendant as an ordinary day laborer, and placed by it in contact with dangerous machinery, and that thereby he was exposed to extraordinary risks, which could not have been reasonably anticipated at the time of the contract of service, that such condition of said machinery was unknown to the plaintiff, but was known to the defendant, or to its agent having general charge of that department of its works, or could by the use of reasonable care and prudence on their part, have become known to the defendant or to such agent, and that the defendant or its agent could by reasonable care have avoided exposing the plaintiff to such risks, and that by reason of the dangerous nature of such machinery the plaintiff was injured, then the plaintiff is entitled to recover; provided they further find that at the time of the said injury, the plaintiff was exercising due care, that he did not by want of

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ordinary care or prudence, contribute to such injury, and that he could not by the use of ordinary care and prudence on his part, have avoided the effects of the want of due care and diligence on the part of the defendant.

4. If from the evidence, the jury find that the defendants owned and operated extensive workshops in the City of Baltimore, and that the plaintiff was employed in the blacksmith shop therein, as an ordinary day laborer, and that while so employed, he was ordered by the officer of the defendant having charge of that department of its works, to assist at a steam hammer in said shop; that said hammer was then, and had been for a long time before, of unsound and insufficient construction, and dangerous to the employés tending it, and that such unsound and dangerous condition was unknown to the plaintiff, but known to the defendant's agent having general charge of said shop, and to the defendant, or would be known to such agent, and the defendant by the exercise of ordinary prudence and care on their part, and that the defendant could by the exercise of reasonable care and diligence, have provided a new hammer to take the place of such unsound hammer, or could by the exercise of the like care and diligence, have repaired the said hammer, so as make it of sound and approved construction; yet that the defendant by not using ordinary care and prudence in the premises, in providing for its operations sound and approved machinery, injured the plaintiff, then the plaintiff is entitled to recover, provided the jury further find that the plaintiff did not contribute to said injury by the want of ordinary care on his part, and that at the time of said injury, he was using ordinary care.

5. If from the evidence, the jury find that the plaintiff was employed by the defendant in its workshops, as an ordinary day laborer, then in entering such employment, the plaintiff had a right to expect that the defendant had used ordinary care and diligence, in the selection of the

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machinery with which he was to be brought in contact, and if they find from the evidence, that the defendant placed the plaintiff in contact with machinery of unsound and unapproved construction, and it, or its agents, to whom it had delegated general control of such work, and the employes therein, (provided they find the defendant had an agent or agents to whom such power was delegated,) knew, or by reasonable care and diligence, could have known of such defective condition of such machinery, and the plaintiff was injured by such machinery, because of its unsound and unapproved construction, while he was in ignorance of such defective condition, and that the defendant or its agent or agents could, by reasonable care and prudence, have avoided exposing the plaintiff to such risks, then the plaintiff is entitled to recover, unless the jury further find that he contributed to such injury by the want of ordinary care and prudence on his part, or that at the time of such injury he was not using due care.

6. If the jury find for the plaintiff, then in estimating the damages they are to consider the health and condition of the plaintiff before the injuries complained of, as compared with his present condition in consequence of said injuries; and whether the said injuries are in their nature permanent, and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of said injuries, he would have been qualified, and also the physical and mental suffering to which he has been subjected by reason of the said injuries, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injuries which the plaintiff has suffered.

And the defendant offered the following prayer:

1. That although the jury may find from the evidence, that the injuries to the plaintiff were caused by the defective condition of the steam hammer, or by the negligence of the agents of the defendant, or by both combined, yet

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the plaintiff is not entitled to recover in this action, without showing also, that the defendant did not use reasonable care in procuring for its operations sound machinery, and faithful and competent employés; and further that in this case, the plaintiff has offered no evidence to show that such reasonable care was not used by the defendant, and therefore that their verdict must be for defendant, if they find that at the time of the injuries to the plaintiff he was in the employ of the defendant in its machine shops at Bolton.

But the Court, (DOBBIN, J.,) rejected all the said prayers of the plaintiff, and granted the said prayer of the defendant. The plaintiff excepted.

The jury rendered a verdict for the defendant and judgment was entered accordingly. The plaintiff appealed.

The cause was argued before BARTOL, C. J., GRASON, MILLER and ROBINSON, J.

*R. F. Brent* and *M. A. Mullin*, for the appellant.

It was the duty of the company to use reasonable care to avoid exposing its servant, the plaintiff, to extraordinary risk, which could not have been reasonably anticipated at the time of the contract of service. *The Cumberland and Penn. R. R. Co. vs. Moran*, 44 Md., 283; *Hutchinson vs. R. W. Co.*, 5 Exch., 353; *Note by Parson to Waller vs. R. W. Co.*, 4 H. & C., 112; *Railroad Co. vs. Fort*, 17 Wallace, 558; *Mann vs. Oriental Mill Co.*, 14 A. L. Reg., N. S., 727.

*Bernard Carter*, for the appellee.

That Hanrathy took the risks of his *voluntary engagement* in this work, is well established by decisions cited by this Court in *Wonder's Case*, 32 Md., 417; *Riley vs. Bazendale*, 6 Hurl. & N., 446; *Bartonskill Coal Co. vs. Reid*, 3 Macqueen, 284, 288; *Seymour vs. Maddox*, 5 Eng.

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*L. & Eq.*, 265; *Dynen vs. Leach*, 40 *Eng. L. & Eq.*, 491; *Griffiths vs. Gidlow*, 3 *Hurl. & N.*, 648; *Williams vs. Clough*, 3 *Hurl. & N.*, 258; *Hard, Adm'r vs. Vermont and Canada R. R. Co.*, 32 *Vermont*, 473 and 478; *Ryan vs. The Cumberland Valley R. R. Co.*, 23 *Penn.*, 384; *Farwell vs. The Boston and Worcester R. R. Corporation*, 4 *Metcalf, (Mass.)* 49; *Walker vs. S. E. Railway Co.*, 4 *Hurl. & Colt.*, 101, 109.

BARTOL, C. J., delivered the opinion of the Court.

The questions presented by this appeal have been before us for consideration on several occasions, they arise from the relation of *employer* and *employé* and involve an inquiry into the mutual rights and liabilities which the law imposes upon parties standing in that relation to each other.

It appears from the record that the appellant was employed at the workshops of the appellee at Bolton, was seriously injured by an accident, and has brought this suit to recover damages therefor from the appellee. The proof shows that the appellant was employed in putting *flues or pipes* under a steam hammer to be mashed, and in removing them from the anvil after they had been mashed; while so engaged his hands were caught under the hammer and badly injured, so that one of them had to be amputated. At the time the accident occurred *Mr. Boss*, another employé, had immediate charge of the hammer and was engaged in working it; the foreman of the shop was *Mr. Ijams*, who employed the appellant and set him to work "feeding the hammer; all the men in the shop were under his control, employed by him, and he could discharge them at his pleasure." *Mr. Cole* was the "*Assistant Master of Mechanics*," having a general supervision over the company's shops in Baltimore, whose duty it was to provide proper machinery for its shops. In case of any repairs being needed to the hammer it was the duty

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of *Mr. Boss* to report the same to *Mr. Ijams*, and of the latter to report to *Mr. Cole* his immediate superior.

There is no evidence that the appellee was negligent in failing to employ competent and faithful employes, or in not procuring sound and sufficient machinery, on the contrary the proof is uncontradicted that *Boss* and *Ijams* were both "first class men" for their positions, and that the hammer was of approved construction, and the best kind of hammer made, when it was placed in the shop.

Some evidence was offered by the plaintiff tending to prove that the accident was caused by the steam hammer not being in good order and condition at the time, or by the negligence of *Boss* who was immediately in charge, engaged in running it.

In this state of the proof the Court below rejected the several prayers asked by the plaintiff, and instructed the jury "that although they might find from the evidence that the injuries to the plaintiff were caused by the defective condition of the steam hammer, or by negligence of the agents of the defendant or by both combined, yet the plaintiff is not entitled to recover in this action without showing also that the defendant did not use reasonable care in procuring for its operatives sound machinery, and faithful and competent employes; and further that in this case the plaintiff has offered no evidence to show that such reasonable care was not used by the defendant, and therefore their verdict must be for the defendant, if they find that at the time of the injuries to the plaintiff, he was in the employ of the defendant at its machine shops at Bolton."

The legal proposition asserted by this instruction is supported by the uniform course of decisions in this State, beginning with *O'Connell's Case*, 20 *Md.*, 212, and followed by the cases of *Shauck*, 25 *Md.*, 462; of *Scally*, 27 *Md.*, 589; of *Wonder*, 32 *Md.*, 411; and *Moran's Case*, 44 *Md.*, 283. In those cases the rules governing the



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rights and liabilities of masters and employes in cases of this kind have been fully stated, and need not be repeated here. There can be no doubt or question that Mr. Boss, to whose negligence the accident is imputed, was a fellow-servant engaged in a common employment with the plaintiff, and according to all the authorities the defendant would not be liable to the plaintiff for the consequences of his negligence, even if it had actually caused the accident. That was one of the risks which the plaintiff assumed when he undertook the employment. And this principle applies whether the alleged negligence of Boss consisted in want of care in the management of the steam hammer or in failing to report to the foreman Mr. Ijams that it was not in good order and needed repair.

Some stress has been laid by the appellant's counsel upon the fact stated by the plaintiff in his testimony, that he was employed to wheel scrap iron from the yard into the shop where the hammer was, and to fill the tanks with water and bring ice, and that the first time he worked at the hammer was on the morning of the accident. It is argued that this was not in the line of his employment. But the testimony of Mr. Cole was that "when first employed by the company he was liable to be put to do anything he was called on to do in or about the shop." However this may be, it appears from his own testimony that he had been at work there for two months;—made no objection when called on to work at the hammer, and voluntarily undertook that employment. The case of the *Railroad Co. vs. Fort*, 17 Wal., 553, has therefore no application to the present.

From the views we have expressed it follows, there was no error in granting the defendant's prayer; and that the prayers of the plaintiff were properly refused. We have considered it unnecessary to comment upon them particularly, in our opinion, looking at the facts of the case as

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disclosed by the record there was no evidence legally sufficient to support the plaintiff's claim and the instruction given to the jury was correct.

*Judgment affirmed.*

(Decided 7th March, 1877.)

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EMILY J. GOLDSMITH *vs.* ELIZABETH A. KILBOURN,  
Executrix of E. G. KILBOURN.

*The Courts of Baltimore City separate and distinct bodies—  
Mode of proving proceedings, judgments, &c., of one of said  
Courts in any other Court—Statute of Limitations.*

Under the Constitution, Art. 4, secs. 26 to 37, relating to the Courts of Baltimore City, the several Courts therein provided for, that is to say, the Superior Court, Court of Common Pleas, City Court, Circuit Court and Criminal Court, are distinct and separate bodies, neither having any authority or control over the clerks, the dockets or records of the others.

The proper mode of proving the proceedings and judgments of one of these Courts in any other Court, is by the production of a transcript thereof under seal duly certified.

The original dockets, or a mere copy of the docket entries, or the original papers, are not proper or admissible evidence for that purpose.

For the like reason the evidence of the deputy clerk of one of said Courts as to the loss of the papers in a case in said Court, is inadmissible in any other Court.

In an action by G. against K. as executrix of her husband, the plaintiff, for the purpose of taking his case out of the operation of the Statute of Limitations, offered in evidence a letter addressed to the plaintiff's attorney by the attorney for the defendant, in these words: "About claim against Mrs. K. please inform me what it is. The executrix will pay it if just." **Held:**

That said letter was inadmissible for that purpose.

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APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

*First Exception.*—*John Young*, a competent witness, testified: I was a clerk in the office of the Clerk of the Court of Common Pleas, at the time the suits were brought by *Sibrey* against *Jacob Green* and *John Street*, and am a clerk there now. Witness produced in Court the docket entries in both cases, and all other the original papers in the case of *Edward Sibrey vs. Jacob Green*.

The plaintiff then offered in evidence the said docket entries and original papers in the said case of *Sibrey vs. Green*. To the admissibility of which original docket entries and original papers the defendant objected, but the Court, (BROWN, J.,) overruled the objection, and permitted the same to be read in evidence to the jury.

The witness, *John Young*, further testified, that he knows the handwriting of all the parties, and that he recognized the handwriting of all the parties, and that witness had been a deputy clerk in the office of the Clerk of the Court of Common Pleas ever since 1854.

The plaintiff then offered in evidence, the docket of the Court of Common Pleas, containing the docket entries in the case of *Edward Sibrey vs. John Street*, which docket was brought into Court by the witness, *John Young*, and identified by said witness as one of the original dockets of said Court of Common Pleas. To the admissibility of which the defendant objected, but the Court overruled the objection, and permitted the same to be read in evidence.

The Court here ruled out and excluded from the jury, as evidence, the hereinbefore mentioned dockets of the Court of Common Pleas, and the said original entries in the cases of *Sibrey vs. Green*, and *Sibrey vs. Street*, and the original papers in the said case of *Sibrey vs. Green*. The plaintiff excepted.

*Second Exception.*—*James Y. Claypole*, a competent witness, testified: I am a deputy writ clerk in the office of

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the Clerk of the Court of Common Pleas; I examined in the office of the Clerk of the Court of Common Pleas, for the papers in the case of *Edward Sibrey vs. John Street*, but did not find them.

To the admissibility of which testimony, the defendant objected, and the Court refused to allow the said evidence to go to the jury. The plaintiff excepted.

*Third Exception.*—The plaintiff then offered in evidence the following letter from E. O. Hinkley to R. J. Bouldin, the handwriting being admitted by the defendant:

*Letter.*

E. O. Hinkley, abt. claim against Mrs. Kilbourn, please inform me what it is. The executrix will pay it if just.  
(23d Oct., '73.) Yours.—E. O. H.

The defendant objected, and the Court refused to allow it to be read. The plaintiff excepted.

*Fourth Exception.*—The plaintiff offered in evidence, and to read to the jury, a certified copy, under the seal of the Court of Common Pleas, of the docket entries and judgments in the case before mentioned of *Edward Sibrey vs. Jacob Green*.

The defendant objected, and the Court refused to allow it to be read to the jury. The plaintiff excepted.

*Fifth Exception.*—The plaintiff offered to read to the jury, a certified copy under the seal of the Court of Common Pleas, of the docket entries and judgment in the before mentioned case of *Edward Sibrey vs. John Street*.

The defendant objected, and the Court refused to allow it to be read to the jury. The plaintiff excepted.

The cause was argued before BARTOL, C. J., GRASON, MILLER and ROBINSON, J.

*R. J. Bouldin*, for the appellant.

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*Edward Otis Hinkley*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

This suit was instituted by the appellant, as assignee of Edward A. Sibrey. It was begun in the Circuit Court for Anne Arundel County on the 27th day of August 1873, removed thence to Baltimore City Court, where the verdict and judgment were against the appellant. The declaration contains the common money counts, and alleges assignment by Sibrey to the plaintiff. The defendant pleaded the general issue pleas, and limitations; the bill of particulars showed items in April 1863, in 1864, February 1867, and June 1868, all more than three years before suit brought. *Five* bills of exception were reserved by the plaintiff to the rulings by the Court below upon questions of evidence. The *first*, *fourth* and *fifth* present the same question, and may be considered together.

Under the Constitution, Art. 4, sec. 27 to 37 relating to the Courts in Baltimore City, the several Courts therein provided for, that is to say the Superior Court, Court of Common Pleas, City Court, Circuit Court, and Criminal Court are distinct and separate bodies, neither having any authority or control over the clerks, the dockets or records of the others. The proper mode of proving the proceedings and judgments of one of these Courts, in any other Court is by the production of a transcript thereof under seal duly certified. The original dockets, or a mere copy of the docket entries, or the original papers are not proper or admissible evidence for that purpose. This was decided in *Jones vs. Jones*, 45 Md., 144. It was there said "that in order to prove the existence of a record which does not belong to the same Court, the proof must be by transcript under seal, and not by the original papers. 2 *Taylor Ev.*, sec. 1380." This rule was there held to apply to the Circuit Court and Superior Court of Baltimore City. For these reasons we affirm the ruling

of the Court below on these exceptions. For the like reason, the evidence of the deputy clerk of the Court of Common Pleas, stated in the *second* bill of exceptions, was inadmissible, and properly excluded.

The only remaining question presented by this appeal arises upon the *third* bill of exceptions, taken to the exclusion of Mr. Hinkley's letter, which was offered for the purpose of taking the case out of the operation of the Statute of Limitations. It was addressed to Mr. Bouldin the plaintiff's attorney, and is in these words "About claim against Mrs. Kilbourn, please inform me what it is. The executrix will pay it if just," and is dated 23 Oct. '73.

This letter cannot be construed as an admission of the debt for which the suit was brought, or a promise to pay it; the letter shows that Mr. Hinkley did not know what the claim was, and it shows also that Mrs. Kilbourn, the executrix, did not know what the claim was or that it was just. No case has gone so far as to admit evidence so vague and indefinite for the purpose of removing the bar of the Statute. We think it was properly excluded.

Finding no error in the rulings of the City Court upon the appellant's exceptions, the judgment will be affirmed.

*Judgment affirmed.*

(Decided 7th March, 1877.)

JOHN BOYD and JOHN BOYD RICKETTS vs. JACOB  
KIENZLE, and others.

*Contract—Construction of—Question whether an obligation entered into by several parties under seal was joint or several—Appeal.*

Twelve persons entered into the following obligation under seal :

"Whereas, P. S. is employed by the Baltimore County Brewing, Malting and Distilling Company, as the manager of said Company; and whereas, the said P. S. is employed and authorized to purchase the malt and hops for said brewery; and whereas, each of the directors of said company have agreed to become individually responsible in the sum of twenty-five hundred dollars each, for malt and hops, which the said manager shall purchase for the use of the said brewery, during the space of one year from the date hereof. Now therefore, these presents witness, that in consideration that said P. S. will undertake said authority and employment, and that dealers in hops and malt will sell to him upon the faith of this bond, we bind ourselves and each of us, our, and each of our heirs, executors and administrators, in the sum of twenty-five hundred dollars each, making in all the sum of thirty thousand dollars, for the payment of hops and malt, which the said P. S. may purchase for the use of said brewery, during the space of one year from the date thereof: and we, and each of us agree and promise, that we will pay such hops and malt bills, in total not exceeding the sum of thirty thousand dollars, or twenty-five hundred dollars each, in the manner and at the time the said P. S. shall agree to pay them."

In an action against all of said obligors jointly, it was HELD :

- 1st. That in the construction of said paper, as in the construction of all written instruments, the cardinal rule to be observed, was to ascertain the intention of the parties as expressed on the face of the paper.
- 2nd. That the said instrument construed all together and in all its parts, was a contract by which each of the obligors had bound himself severally for \$2500 only.

If a question arises whether a covenant be joint or several with respect to the covenantees, that is to say, whether parties claiming the benefit of the cove-

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nant must sue thereon jointly or may sue severally, regard must be had to the interests of the covenantees in the covenant.

But this rule has no application to the construction of a covenant, with respect to the obligation of the covenantors, in determining whether they are bound jointly, or jointly and severally, or severally only, and the extent of the obligation.

In the above action on appeal it was HELD :

1st. That the obligation was several and not joint, and that the action could not be sustained.

2nd. That, as it appeared that the plaintiffs had voluntarily suffered a judgment of *non pros.* and no final judgment was entered in the cause, no appeal would lie.

### APPEAL from the Superior Court of Baltimore City.

The plaintiffs below sued the defendants jointly on their obligation under seal, the nature of which is stated in the opinion of the Court. Some of the defendants appeared and pleaded, "never indebted," and *non est factum*.

*Exception.*—The plaintiffs offered three prayers, which are omitted, as they were not considered by this Court. And the defendant offered the following prayer :

That the obligation sued upon in this case is a several obligation, and the plaintiffs are therefore not entitled to recover under the pleadings in this case.

The Court, (DOBBIN, J.,) rejected plaintiffs' prayers, and granted that of defendants, and upon the ground that the bond in evidence was a several and not a joint bond, directed the clerk to enter a judgment of *non pros.* as to the parties who had pleaded, and upon whose pleas issues had been joined. The plaintiffs excepted and appealed.

The cause was argued before BARTOL, C. J., STEWART, BRENT, GRASON, MILLER and ROBINSON, J.

George Hawkins Williams, for the appellants.

The true reading of the bond sued upon is, that it is an undertaking by the obligors to be responsible jointly for



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the aggregate sum of \$30,000, or, in the alternative, to be responsible for \$2500 each, to any person entitled to sue the bond; and the \$2500 is also the measure of contribution for each *inter sese*. It is impossible to read a bond containing the words, "we bind ourselves, and each of us, our, and each of our heirs, etc.," and "we and each of us, agree and promise that *we* will pay such hops and malt bills, in total, not exceeding the sum of thirty thousand dollars, or twenty-five hundred dollars each," otherwise than as a *joint undertaking* for the whole sum, and an alternative undertaking to any holder of the bond severally. It is a question of construction of words; and intention not only is best arrived at from express words, but all rules of construction bend to express words. *Keightley vs. Watson, Welsby, H. & Gordon*, 3 *Exch.*, 725; or rather, express words conclusively establish intention.

If the words be ambiguous or susceptible of two constructions, then we look to the interests of those intended to be protected by them, and construe accordingly. *Keightley vs. Watson*, 3 *Exch.*, 723.

But *quoad* covenantors or obligors, the language of severalty or joinder, and not the interest of the covenantees, is the test of the quality of the covenant. 1 *Parsons on Contracts*, note j, *marg.* 14.

Here that the words import both a joint and several contract, can admit of no doubt. *Platt on Covenants*, 2 *Law Lib.*, *marg.* 118; *Mitchell vs. Darricott*, 3 *Brevard, S. C. Rep.*, 145; *Episcopal Church vs. Varian*, 28 *Barbour, N. Y.*, 649; *Fletcher vs Manning*, 12 *Mees. & Wels.*, 572.

These references contain the very words found in this bond.

If twelve men sign an obligation to pay money, *prima facie*, signing jointly makes it joint—and it should require most stringent words, if it was not so intended, to exclude such a construction—no such excluding phraseology is to be found in this obligation.

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That the action was well brought will be seen, Art. 49, Code, vol. 1, sections 2 and 6. In fact, as section 6 says that all obligors "residing in the same county shall be sued in one action." Not only was this action well brought, but any other manner of bringing it would have been fatally defective, and the judgment below should be reversed.

*Samuel Snowden and Albert Ritchie*, for the appellees.

The mere fact that the obligors all joined in the execution of one paper would not make it a joint or a joint and several contract, but being by the language of the paper bound *severally*, it is the same as if each of them had executed a separate covenant on the same paper, and a joint action cannot therefore be maintained against them. *Chitty on Con.*, (11 Ed.) 1354; *Mathewson's Case*, 5 Coke, 23 a; *Platt on Cov.*, 1 Law Lib., top page 52.

The recital uses the word *individually*, meaning thereby separately, and precluding the idea of a joint liability; and as the whole instrument is to be construed together, if there is any doubtful or indefinite expression in the condition, it would be restrained by the recital. *State vs. Wayman*, 2 G. & J., 254; *Wood vs. Fulton*, 2 H. & G., 71; *Strawbridge vs. B. & O. R. R.*, 14 Md., 360.

The intent of the parties in binding themselves, as well as the legal intent, is fully observed by treating this paper as several obligation. *Parrish vs. State*, 14 Md., 246.

And the Courts will not force them to a joint act when they have clearly expressed their intention to do a separate act. *Keightley vs. Watson, &c.*, 3 Exch., 716, 724.

The plain reading of the instrument shows that they intended to be bound *in the sum of \$2500 each*—meaning that each of them should be separately liable for the sum of \$2500; and having thus manifested their intention, they must be sued separately. *Lee vs. Nixon*, 1 A. & E., 201 and 208, (28 E. C. L., 67.)

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The language of the obligation; the use of the word "each;" the severance of the sum of \$30,000 into the sum of \$2500 each; and the use of the word "individually," shews the intention of the parties that the same should be a *several, only*, and not a *joint or joint and several* contract. *Fell vs. Goslin*, 7 *Exch.*, (*W. H. & G.*,) 185; *Collins vs. Prosser*, 3 *Dowling & Ryland*, 112, (16 *E. C. L.*, 146;) *Same Case*, 1 *Barn. & Cres.*, 682, (8 *E. C. L.*, 184;) *Williamson vs. Chiles*, 5 *Iredell*, (*Law*,) 244; *Parrish vs. State*, 14 *Md.*, 246.

The papers sued upon in these cases are very similar to the language of the obligation in this case, and were all held to be *several* and not *joint* contracts.

The sections of the Code referred to in the appellants' brief do not apply, as they only refer to the cases of a *joint*, and *joint and several* contracts, and not to a *several* contract. The rule of law which requires that where the contract is *several* the parties must be sued separately, is not changed or affected by these provisions of the statute law, and as this case must be governed by that rule, and therefore the judgment below was correct and should be affirmed.

BARTOL, C. J., delivered the opinion of the Court.

The only question presented by this appeal, is whether the obligation set out in the declaration, and offered in evidence, is the *joint* or the *several* undertaking of the obligors whose seals are affixed thereto.

The solution of this question depends upon the true construction of the instrument which is as follows:

"Whereas Peter Schneider is employed by the Baltimore County Brewing, Malting and Distilling Company, as the manager of said Company. And whereas the said Peter Schneider is employed and authorized to purchase the malt and hops for said Brewery. And whereas each of the Directors of said Company have agreed to become

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individually responsible in the sum of twenty-five hundred dollars each, for malt and hops, which the said manager shall purchase for the use of the said Brewery, during the space of one year from the date hereof.

"Now therefore these presents witness, that in consideration that said Peter Schneider will undertake said authority and employment, and that dealers in hops and malt will sell to him upon the faith of this bond; we bind ourselves, and each of us, our and each of our heirs, executors and administrators, in the sum of twenty-five hundred dollars each, making in all the sum of thirty thousand dollars, for the payment of hops and malt which the said Peter Schneider may purchase for the use of the said Brewery during the space of one year from the date hereof; and we and each of us agree and promise, that we will pay such hops and malt bills, in total not exceeding the sum of thirty thousand dollars, or twenty-five hundred dollars each, in the manner and at the time the said Peter Schneider shall agree to pay them.

"Witness our hands and seals this the 22d day of December in the year of our Lord one thousand eight hundred and seventy-three."

This bond is signed and sealed by twelve persons who are jointly sued in this action.

In the construction of this paper, as in the construction of all written instruments, the cardinal rule to be observed is to ascertain the intention of the parties, as this is expressed on the face of the paper.

In *Chitty on Contracts*, vol. 1, 1354, the author says: "If two or more persons, who have joined together in a contract 'covenant severally' or become severally bound, it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate deed on the same paper. A joint action cannot, consequently, be maintained against the parties to such a contract, but each must be sued separately upon the sepa-

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rate contract made by each. But in order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it."

Now looking carefully at the instrument before us, and construing it all together, and in all its parts, we have had no difficulty in arriving at the conclusion, that it is a contract by which each of the obligors has bound himself severally for twenty-five hundred dollars only. The preamble recites that "*each* of the directors of the company have agreed to become *individually* responsible in the sum of \$2500 *each*, for malt and hops which the manager shall purchase." And in the binding part, *distributive* and not *collective* words are used "we bind ourselves and each of us, our and each of our heirs, &c. *in the sum of \$2500 each*, making in all \$30,000, &c.," and "we and each of us agree and promise that we will pay such hops and malt bills, in total not exceeding the sum of \$30,000, *or twenty-five hundred each*," &c. These words, the appellants contend, import a joint obligation, binding the parties jointly in the whole sum of \$30,000; but we think it very clear, that such is not the true construction of the bond, nor according to the intent and meaning of the parties, which was in no event to be bound, except severally, and *each* in the sum of \$2500 and no more.

We have examined all the authorities cited by counsel, and several others, and have found none which sustain the appellants' views. The construction of the contract in this case depends entirely upon its own terms, and very little aid can be derived from a reference to decided cases, in which the phraseology of the papers under consideration, is not identical with the one before us. We think

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however the decisions in *Fell vs. Goslin*, 7 *Exch.*, 185; *Lee vs. Nixon*, 1 *A. & E.*, 201, (28 *E. C. L.*, 67;) *Collins vs. Prosser*, 1 *B. & C.*, 682, (16 *E. C. L.*, 146;) *Williamson vs. Chiles*, 5 *Iredell*, (*Law R.*) 244, and *Parrish vs. The State*, 14 *Md.*, 246, are analogous to the present in many respects, and tend to support the opinion we have expressed as to the proper construction of the obligation, on which this suit is brought. If a question arises whether a covenant be joint or several with respect to the covenantees, that is to say whether parties claiming the benefit of the covenant must sue thereon jointly or may sue severally, regard must be had to the interests of the covenantees in the covenant. *Lahy, &c. vs. Holland*, 8 *Gill*, 446; *Jacobs vs. Davis*, 34 *Md.*, 204, 210, 211.

The cases of *Keightley vs. Watson*, 3 *Exch. R.*, 723, and *Bradburne vs. Botfield*, 14 *Mees. & W.*, 559, cited by the appellant were cases in which the question was whether the covenant was joint as to the covenantees, and the consideration of the nature of their interests in the subject-matter entered into, and formed the ground of the decision.

But this rule has no application in the construction of a covenant with respect to the obligation of the covenantors, in determining whether they are bound jointly, or jointly and severally, or severally only, and the extent of the obligation. *Platt on Cov.*, 123, 124, (3 *L. Lib.*, 55;) 1 *Parsons on Contracts*, 14, (note j,) where it is said, "The language of severalty or joinder, and not the interest, is then the test of the quality of the covenant *quoad* the covenantors. *Enys vs. Donnithorne*, 2 *Bur.*, 1190."

We think the learned Judge of the Superior Court was clearly right in construing the obligation as several and not joint, and that this action cannot be sustained.

We have considered it proper to express our opinion upon the main question, which has been fully argued by counsel, but as it appears, the plaintiff below voluntarily

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suffered judgment of *non pros.*, and no final judgment was entered in the cause, no appeal lies. See *Evans' Practice*, 314; *Graham, &c. vs. Parran, &c.*, 5 G. & J., 489; *State, use of Boone vs. Bryan, &c.*, 3 Gill, 388, and *Kemp-land vs. McCauley*, 3 T. R., 436.

*Appeal dismissed.*

(Decided 8th March, 1877.)

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### THE MUTUAL LIFE INSURANCE COMPANY OF BALTIMORE *vs.* CAROLINE STIBBE.

*Immaterial question—Deed poll—Contract—Parties who may sue on policy of insurance—For what purpose and to what extent Preliminary Proofs of death are admissible as Evidence at the trial—Questions of law and fact—What was the Direct Cause of Death a question for the jury.*

In an action on a policy of life insurance, after the plaintiff had closed her case, the defendant objected to the admissibility of the policy in evidence, and moved the Court to exclude it from the consideration of the jury, because the plaintiff had not offered in evidence the "application" for insurance. On appeal from the action of the Court below in overruling the motion, it was **Held** :

That the question had become immaterial, inasmuch as the "application" was afterwards given in evidence by the defendant.

The insurance was effected on the life of S. The application for insurance showed that the wife of S. was one of the contracting parties. It was signed with her name as well as her husband's. He signed as the person whose life was insured, and she as the person for whose benefit the insurance was made. The covenant in the body of the policy was, "to pay to S. at the time named, if he should be then living, and if he should die previous thereto, to pay to his wife, C., or her legal representatives." The policy was executed by the company alone. **Held** :

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- 1st. That the policy was to be regarded as a deed poll.
- 2nd. That the covenant therein to pay to the wife was made directly with her, and there could be no valid objection to her maintaining a suit upon it in her own name.
- By the terms of the policy the amount insured was payable in ninety days after satisfactory proofs of death. At the trial, the proofs of death furnished in compliance with this requirement were offered in evidence by the plaintiff, for the purpose of showing such compliance. **HELD :**
- 1st. That the same were admissible for that purpose and for no other, and their sufficiency was a question for the Court to determine.
- 2nd. That the said proofs, being also offered in evidence by the defendant, were admissible as declarations of the plaintiff.
- 3rd. That the statement of the plaintiff as to the cause of the death of the insured, accompanying said preliminary proof, did not properly constitute any part of the proof of death required by the policy, but was the mere declaration made by her of her opinion and belief as to the cause of the death, and as such the defendant was entitled to rely upon it before the jury; not as conclusive, but as evidence to be considered by the jury in connection with all the other evidence in the case, upon the question as to the actual cause of the death of the insured, a question which the jury alone could decide.
- 4th. That it would have been error to instruct the jury that any part of the evidence as to the cause of the death was to be taken by itself as conclusive.
- The statement of the physician was that the disease of which the insured died, was "*cerebral congestion*, caused proximately by mental anxiety and remotely by drink." By the terms of the policy, it was to be void "if the death shall be caused by the use of intoxicating drink or opium." **HELD :**
- That the meaning of this provision was that the things prohibited, should be the *direct* cause of the death, in order to avoid the policy, and it was not error so to instruct the jury.

**APPEAL** from the Court of Common Pleas.

The case is stated in the opinion of the Court.

*First Exception.*—Stated in the opinion of the Court.

*Second Exception.*—The plaintiff offered the following prayer:

If the jury shall find from the evidence that Caroline Stibbe, the plaintiff, is the widow of Solomon D. Stibbe,



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and that the defendant corporation executed the policy of insurance offered in evidence, and delivered the same to the said Solomon, and that he paid to the defendant all the premiums due thereon up to the time of his death, and that he died on or about the twenty-ninth day of January, 1875, and that the plaintiff exhibited to the defendant the proofs of death which were offered in evidence on or about the ninth day of February, 1875, then the jury must find a verdict for the plaintiff, unless the jury shall find from the evidence that Solomon D. Stibbe made an untrue statement in answer to the fifth interrogatory in his application for the policy of insurance; or unless the jury shall find from the evidence that the direct cause of Solomon's death was the use of intoxicating drink, and it will not be sufficient to defeat the plaintiff's right to a verdict, if the jury shall find from the evidence that the use of intoxicating drink was the indirect cause of Solomon's death.

And the defendant offered the five following prayers:

1. The defendant prays the Court to instruct the jury, that the affidavit of the plaintiff contained in the proof of death offered in evidence by her, is conclusive upon her as to the cause of the death of the insured, and that the cause of death set forth in said affidavit is not such as to entitle her to recover in this action upon the policy of insurance sued on in this case.

2. That if the deceased died from a different cause from that set forth in the affidavit of the plaintiff contained in the proofs of death offered in evidence by her, then the plaintiff is not entitled to recover in this action.

3. The defendant prays the Court to instruct the jury, that the plaintiff is not entitled to recover in this action, and that it is not competent for her to sue in her own name and in her own right upon the policy of insurance offered in evidence in this case.

4. That if the jury find from the evidence that the death of the deceased was occasioned by the use of intoxi-

cating liquor, the plaintiff is not entitled to recover in this action.

5. That if the jury find that at the time the policy of insurance was issued, the insured had been a man whose habits had not been sober and temperate, the plaintiff is not entitled to recover.

The Court (GAREY, J.,) granted the plaintiff's prayer, and granted the fourth and fifth prayers of defendant, and refused the first, second and third prayers of defendant. The defendant excepted.

The jury rendered a verdict for the plaintiff, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., STEWART, GRASON and MILLER, J.

*Charles Marshall*, for the appellant.

There was error in granting the plaintiff's prayer, because it submits to the jury a question of law, viz., What is the direct, and what the indirect cause of death? The question is a mixed question of law and fact, and the Court should have instructed the jury as to what is in law a direct or proximate cause of death, leaving the jury to find whether the facts proved established such a cause of death in this case. And because it was calculated to mislead the jury.

It is difficult to understand what is meant by the expressions "direct cause" and "indirect cause" of death, used in the prayer.

The proof of death made by plaintiff herself, and offered in evidence by her, and affirmed by her to be true in her testimony, shows that mental anxiety caused the insured to indulge in drink, and the anxiety *and drink* killed him.

Now it may be said that the insured drank from mental anxiety, and therefore the direct cause of death, the *causa causans*, was mental anxiety.

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So if he drank because he loved liquor, the direct cause, we suppose, would not be the liquor itself, but the love of it; and under such a construction, the provisions of the policy on the subject of death from drink, would become nugatory.

If death was caused *by drink*, although there may have been other contributing causes, drink was a proximate cause of death, and the jury should have been so instructed. If mental anxiety alone did not cause death, but mental anxiety *and drink* did, then drink was the proximate cause of death.

There was error in rejecting the defendant's first and second prayers.

The plaintiff herself had made affidavit to the cause of death, and that statement bound her. In fact, she reiterated it when examined as a witness. In this case, she was bound by the affidavit, if for no other reason, because there was absolutely no evidence to the contrary.

The evidence of the attending physician does not conflict with the plaintiff's affidavit as to the cause of death. *Irving vs. Excelsior Fire Ins. Co.*, 1 *Bosworth*, 507, 509; *Campbell vs. Charter Oak Fire & Marine Ins. Co.*, 10 *Allen*, 213; *Mutual Benefit Life Ins. Co. vs. Newton*, 22 *Wallace*, 32.

The defendant's third prayer is based upon the policy itself. This being a contract between the company and the assured, the plaintiff could not sue upon it.

It is not an insurance of the life of Stibbe under a contract between the company and the plaintiff, but the contract, which is under seal, is between the company and Stibbe himself. In one event, the policy is to be paid to Stibbe, in another to his wife; but the promise in either case is made to Stibbe, and he or his legal representatives only can maintain the suit.

There is no covenant with the plaintiff, but there is a covenant with Stibbe to pay the plaintiff, in a certain contingency.

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She cannot sue on such a contract. *Flynn vs. North American Life Insurance Co.*, 115 *Mass.*, 449; *Woodberry Savings Bank vs. Charter Oak Ins. Co.*, 29 *Conn.*, 374; *Balto. Fire Ins. Co. vs. McGowan*, 16 *Md.*, 47.

*H. L. Emmons and Wm. Shepard Bryan*, for the appellee.

To explain the points under the second exception, we must advert to the issues in the cause.

The policy was void if the death was caused by the use of intoxicating drink; or if any of the statements in the application was untrue.

The defendant set up these two defences, and the evidence was directed to these two points. The Court in the instructions granted, left these two questions to the jury. There was no other contested question of fact in the case, everything else being admitted, as appears from the first exception.

It is rather late for the defendant to say that the plaintiff's prayer left a question of law to the jury. The phraseology of the prayer is, that commonly used and has been frequently sanctioned by this Court. Among other instances there is the second prayer of plaintiff in *Balto. & Ohio R. Road vs. Fitzpatrick*, 35 *Md.*, 35; plaintiff's prayer in *Georgia Ins. Co. vs. Dawson*, 2 *Gill*, 368; plaintiff's first prayer in *B. & O. R. R. Co. vs. Slate, use of Trainor*, 33 *Md.*, 542; plaintiff's first prayer in *McMahon vs. N. C. Railway*, 39 *Md.*, 451; *Price's Case*, language of Court, 29 *Md.*, 437, at bottom of page.

It has never been supposed that the question of direct cause was not a question for the jury. If the defendant had desired any explanations to be given to the jury on this point, he should have offered a prayer for the purpose.

The amount insured was payable "in ninety days after satisfactory proofs of death." It was necessary for the

plaintiff to show that these preliminary proofs had been furnished. But the proofs were not evidence in her behalf for any other purpose than to show that she had complied with the requirements of the policy in that regard. *Citizens' Fire Ins. Co. vs. Doll*, 35 Md., 89; and she did not use them for any other purpose. It was necessary to offer them, so that the Court could determine their sufficiency. They were, however, competent evidence for the defendant to show plaintiff's declarations. They were accordingly offered by it, and Dr. Keirle and Mrs. Stibbe were examined by defendant, as to the statements made by them respectively in these preliminary proofs. The burden of proof was on defendant to sustain its defences, and it examined these two witnesses for that purpose. *Piedmont, &c., Ins. Co. vs. Ewing*, 2 Otto, (S. C. Reps.,) 377; *Jones Manufacturing Co. vs. Manufacturing and F. I. Co.*, 8 Cushing, 82; *Insurance Co. vs. Francisco*, 17 Wallace, (S. C.,) 672. The defendant's first prayer seeks to exclude from the jury all of its own evidence on the cause of death, except Mrs. Stibbe's statement of opinion contained in the preliminary proof, and pronounces a matter of law that this defeats the recovery. Be it observed, that the statement was that mental anxiety and indulgence in drink, "caused his death in my opinion." It does not show which of these causes in her opinion was remote and proximate. The doctor's statement which was a part of the same document, and which was also offered in evidence by defendant, shows that deceased died from cerebral congestion, and that the remote cause was drink, and the proximate cause was mental anxiety. Mrs. Stibbe's opinion does not show that the death arose from one of the prohibited causes. Dr. Keirle's statement shows positively that it did not arise from a prohibited cause.

Cases have occurred where the preliminary proof has shown that the plaintiff was not entitled to recover; and in some of these cases, the Courts have held that the plain-

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tiff could not introduce evidence, showing that the preliminary proof was not true in a material fact, which if it existed as stated in the preliminary proof, was fatal to the right of recovery. *Vide* the language of the Court in *Campbell vs. Charter Oak, &c. Co.*, 10 *Allen*, 219. In other cases, it has been held that the preliminary proofs were evidence for defendant. *Mutual Benefit L. I. Co. vs. Newton*, 22 *Wallace*, 32. The whole preliminary proof of course would be taken together, as showing what the plaintiff's statement really was. The distinction between such cases, and the case at the bar, is sufficiently obvious.

The defendant's third prayer asserts that the plaintiff cannot sue in her own name on the policy.

The policy is under seal. It is a contract made with both Solomon Stibbe, the deceased, and with the plaintiff, his wife. The defendant was authorized to make it both by its charter, Act of 1858, ch. 276, sec. 9; and by the Act of 1862, ch. 9, sec. 8. The language of the application shows that plaintiff was one of the contracting parties, as also her husband. It is signed in her name, as well as her husband's. The policy is a contract with a double aspect; it is a contract with Solomon to pay the insurance to him, in the event of his living until A. D., nineteen hundred and four; it is also a contract with the plaintiff, to pay her in the event of his dying before that time. But if it were otherwise, it would be proper for the plaintiff to sue. In *Chitty's Pleading*, 1 vol., page 4, (Edition of 1833,) it is said, "if the covenant in a deed poll be generally 'to pay B.,' &c., there appears to be no difficulty in maintaining an action in his own name, although he did not execute the deed, and were in all respects a stranger to it." The rule is different in the case of a deed *inter partes*; but this policy is a deed poll. Many cases may be cited where the contract is expressly made "to and with" a certain person, and he is then the party to sue. Such is not the case at bar.

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BARTOL, C. J., delivered the opinion of the Court.

This is a suit brought by the appellee, widow of Solomon D. Stibbe, on a policy of insurance made by the appellant on the life of her husband. By agreement of counsel all errors in pleading were waived.

At the trial below two exceptions were reserved by the appellant, which will be disposed of in their order.

The plaintiff read in evidence the Acts of Assembly incorporating the defendant, then offered the policy under the seal of the defendant, which the defendant's counsel admitted had been duly executed, and delivered to Solomon Stibbe, and further admitted that Solomon died on the 29th day of January 1875 and that the plaintiff was his widow. The plaintiff then offered the proofs of death, which it was admitted, were exhibited to the defendant on or about the 9th day of February 1875, and that they were filled up from printed blanks furnished by the defendant. It was also admitted that Solomon had paid to the defendant all the premiums due on the policy to the time of his death. Here the plaintiff closed her case, whereupon the defendant objected to the admissibility in evidence, of the policy of insurance, because the plaintiff had not offered in evidence, the application for insurance on the life of the deceased and moved the Court to exclude the policy from the consideration of the jury. The refusal of this motion forms the ground of the *first* bill of exceptions. But the decision of the question intended to be raised thereby, has become altogether immaterial, inasmuch as the "application" was afterwards given in evidence by the defendant, and the company was therefore in no respect injured or prejudiced by the action of the Court, in overruling the motion. The *second* bill of exceptions brings before us for review the rulings of the Court below upon the prayers; and the first question we shall consider is the legal right of the plaintiff to maintain a suit upon the policy.

This question is raised by the defendant's *third* prayer, which asserts the proposition that "it is not competent for the plaintiff to sue in her own name, and in her own right upon the policy of insurance." It is argued by the appellant's counsel that the contract of insurance was made with Solomon, and being under seal, although made for appellee's benefit, she cannot maintain an action at law thereon, not being a party to the covenant. The law on this subject is well settled. "It is an inflexible rule," says *Chitty*, (1 *Ch. Pl.*, 3,) "that if a deed be *inter partes*, that is on the face of it expressly describe and denote who are the parties to it, (as between A. of the first part and B. of the second part) C. if not expressly named as a party cannot sue thereon, although the contract purport to be made for his sole advantage, and contain an express covenant *with him* to perform an act for his benefit, in such case C. is a stranger to the deed, and violence would be done to the expressed intention of the parties, were he to be allowed to maintain an action in his own name."

For this the author cites *Bushell vs. Bevan*, 1 *Bing. N. C.*, 120, and several other authorities, many more might be cited. *Flynn vs. N. A. L. Insurance Co.*, 115 *Mass.*, 449, referred to by the appellant, was decided and no doubt correctly, in accordance with this rule; but we think it has no application to this case. The contract here sued on is not one strictly *inter partes*, but is the covenant of the appellant alone, not executed by any other person, it is therefore a *deed poll*, and it is laid down by *Chitty* (1 *Ch. P.*, 4,) that "if the covenant in a *deed poll* be *generally* to pay B. \* \* \* \* there appears to be no difficulty in his maintaining an action in his own name, although he did not execute the deed, and were in all other respects a stranger to it." See also, *Platt on Covenants*, 7, 8, (3 *L. Lib.*)

But in our opinion the contract of insurance was made with her as well as with her husband. The Act of 1862,



ch. 9, gave her the power to obtain the insurance, and the defendant was authorized to make it, both by its own charter, 1858, *ch.* 276, *sec.* 9, and by the Act of 1862. The application for insurance shows that she was one of the contracting parties, it is signed with her name as well as her husband's, he signs "*as the person whose life is insured,*" and she "*as the person for whose benefit the insurance is made.*" The covenant in the body of the policy is "to pay to Solomon, at the time named, if he should be then living, and if he should die previous thereto, to pay to his wife Caroline or her legal representatives."

It is therefore a covenant made directly with her, and there can be no valid objection to her maintaining a suit upon it in her own name; it was therefore not error to reject the appellant's *third* prayer.

In the application for insurance, the habits of Solomon Stibbe were represented to be sober and temperate; and the conditions of the policy were, that it should be void *if the representations were untrue, or if the death of the party assured should be caused by the use of intoxicating drink or opium.* The *fourth* and *fifth* prayers of the defendant, which were granted, gave it the full benefit of its defence before the jury, based upon the conditions in the policy to which we have referred. The *first* and *second* prayers of the defendant were refused, and require to be noticed.

By the terms of the policy the amount insured was payable "*in ninety days after satisfactory proofs of death.*" To show that the plaintiff had complied with this requirement of the policy, the proofs of death were offered by her at the trial, they were admissible for that purpose and for no other and their sufficiency was a question for the Court to determine. *Citizens' F. Ins. Co. vs. Doll*, 35 Md., 89, 102. They were offered also by the defendant and were of course admissible, as declarations of the plaintiff. These

preliminary proofs consisted of, or were accompanied with, a number of answers; to questions furnished by the appellant in printed blanks, filled up by the appellee, the physician, the undertaker, and one *Stokes*, a friend of the deceased. Among the questions answered by each of these persons, except the undertaker, was one requiring a statement of the cause of the death. In the answer to this question the appellee's statement was, "He was caused a great deal of mental anxiety on account of business troubles, which caused him to indulge somewhat in intoxicating drinks, and this anxiety and indulgence in drink caused his death in my opinion."

The appellant contends that this statement is conclusive upon the appellee, and the first prayer asks an instruction to the jury "that the affidavit of the plaintiff contained in the proof of death offered in evidence by her, is conclusive upon her as to the cause of the death of the insured, and that the cause of death set forth in said affidavit is not such as to entitle her to recover in this action, upon the policy of insurance sued on in this case."

This prayer seeks to give undue force and effect to the statement made by the appellee; this did not properly constitute any part of the proof of death required by the policy, it was the mere declaration made by the appellee of her opinion and belief as to the cause of the death, and as such the defendant was entitled to rely upon it before the jury; not as conclusive, but as evidence to be considered by the jury in connection with all the other evidence in the case upon the question as to the actual cause of the death of the insured, a question which the jury alone could decide and which was submitted to them by the appellant's fourth prayer. Upon that question the jury had before them not only the statement of the appellee, but also that of the physician accompanying the proofs of death which formed a part of her declaration and to be taken with it. They had also the testimony of a number of witnesses

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examined both by the plaintiff and the defendant, all of which was to be considered by the jury, and it would have been error to instruct them, as asked by the defendant's first prayer, that any part of this evidence was to be taken by itself as conclusive. For these reasons this prayer was properly refused, and for the same reasons the second prayer was also properly refused. This prayer asked an instruction "that if the deceased died from a different cause from that set forth in the affidavit of the plaintiff contained in the proofs of death offered in evidence by her, then the plaintiff is not entitled to recover in this action. This prayer like the first is erroneous in ascribing to the declaration of opinion made by the plaintiff a conclusive effect, and in separating it from other parts of the evidence on the same subject, which had been given to the jury; all of which, as we have said, was to be considered by them in making their verdict." *Life Ins. Co. vs. Francisco*, 17 *Wallace*, 672.

As to the plaintiff's prayer, we discover no defects in it and think it was properly granted. The only objection made to it, by the appellant's counsel in the argument, is "that it was calculated to mislead the jury," in submitting to them to find what was the *direct* cause of Stibbe's death. The objection is to the use of the word "*direct*," but we think the jury could not have been misled. The statement of the physician was that the disease of which Stibbe died was "*cerebral congestion* caused proximately by mental anxiety and remotely by drink."

By the terms of the policy, it was to be void, "if the death shall be caused by the use of intoxicating drink or opium." The meaning of this is that the things prohibited should be the *direct* cause of the death in order to avoid the policy, and it was not error so to instruct the jury.

*Judgment affirmed.*

(Decided 7th March, 1877.)

THE LAFLIN AND RAND POWDER COMPANY *vs.*  
LOUIS SINSHEIMER, JACOB PLACK and JOSEPH  
RITTENBERG.

*Attempt to impeach the validity of an Incorporation, by Evidence Aliunde the Certificate in a Collateral proceeding.*

The Courts are bound to regard a company incorporated according to all the required forms of law, as a corporation so far as third parties are concerned, until it is dissolved by a judicial proceeding in behalf of the government that created it.

The plaintiff sued certain members of a corporation to make them liable individually for goods sold and delivered to the corporation, upon the ground that said individuals had not been duly incorporated by reason of non-compliance with statutory requirements. Proof was offered by the plaintiff tending to show that certain requirements, which the plaintiff claimed to be conditions precedent to the incorporation of the defendants, had not been complied with. The certificate of incorporation disclosed no error upon its face, and was authenticated in such manner as was declared by the statute under which it was made, should be sufficient evidence of the existence of the corporation. **Held:**

- 1st. That the plaintiff stood in this case in the attitude of a third person to the corporation, and could not by proof *aliunde* the certificate impeach its corporate existence.
- 2nd. That the company was a corporation *de facto* at the time the goods were sold and delivered to it by the plaintiff, and its existence as a corporation could not be drawn collaterally in question.
- 3rd. That the exhibition of its incorporation, duly and properly authenticated, was a sufficient answer to the claim preferred against the defendant.

**APPEAL** from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

*Exception.*—At the trial, the plaintiff offered the two following prayers :

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Laffin and Rand Powder Co. *vs.* Sinsheimer.

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1. If the jury shall find that at the time the articles dated February 6th, 1876, were signed, and the acknowledgment and affidavits of Kraus and Rittenberg thereto annexed, and were made at the time when said articles so acknowledged with said affidavits annexed, were filed with the Secretary of the State of West Virginia, for the purpose of procuring the certificate of incorporation of the Lancaster Furnace and Mining Company offered in evidence, and at the time when said certificate was so issued, Lewis and Jacob Kraus, whose names are signed to said articles, had in fact paid nothing on account of their subscriptions, and that they nevertheless treated themselves, and were treated by their associates, as corporators, and were so represented to the Secretary of State of West Virginia for the purpose of procuring the same, then said Lancaster Furnace and Mining Company was not a body politic, and those persons who were acting under that name, and interested in the profits of said pretended company, at the time the debt sued for was contracted, are personally liable for said debt, if the jury find the same.

2. The plaintiff prays the Court to instruct the jury, that under the law of West Virginia, offered in evidence, if they find that at the time the certificate of incorporation of the Lancaster Furnace and Mining Company, offered in evidence, dated 10th day of February, 1874, was issued by the Secretary of State of West Virginia, the persons whose names are signed to the articles of association, dated February 6th, 1874, offered in evidence and recited in said certificate, or any one or more of them, had not in good faith paid in for the uses of the company, to some person agreed upon to receive the same for the intended corporation, the full amount of ten per cent. upon the par value of the stock subscribed for by said persons, or by one or more of them, and that they did not in fact pay said ten per cent., and that notwithstanding said failure of said subscribers, or one or more of them, to pay said

amount of ten per cent., that the subscribers had so failed to pay said ten per cent., were treated as corporators, and suffered as such to sign said articles of February 6th, 1874, and were represented to the Secretary of State of West Virginia, as corporators, for the purpose of procuring said certificate of incorporation from said Secretary of State, then said Lancaster Furnace and Mining Company was never validly incorporated, and such of the persons composing the said pretended company, as were members of it at the time the debt sued for was contracted, are personally liable to the plaintiff for said debt, if said debt be found by the jury.

The Court, (DOBBIN, J.,) rejected both prayers, and granted the following instructions:

1. That there is no evidence upon which the jury can find for the plaintiff on the first or second count in the *narr.*

2. That the plaintiff having given in evidence the Statutes of West Virginia, under which the Lancaster Furnace and Mining Company claims to have been incorporated, and the certificate of the Secretary of State of said State, declaring the existence of said corporation, it is incompetent for this Court, to inquire collaterally into the validity of said corporation, and the plaintiff cannot recover upon the third and fourth counts in the *narr.* The plaintiff excepted.

The jury rendered a verdict for the defendants, and judgment was entered accordingly. The plaintiff appealed.

The cause was argued before BARTOL, C. J., STEWART, BRENT, GRASON, MILLER and ROBINSON, J.

*Charles Marshall*, for the appellant.

It seems to be well settled that the omission or non-performance of an Act made a condition precedent to the existence of a corporation, prevents it from becoming a

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corporation. *Frost vs. Frostburg Coal Co.*, 24 *Howard*, 282; *Vulk vs. Crandall*, 1 *Sanford*, ch. 179; *Taggart vs. Western Md. R. R. Co.*, 24 *Md.*, 591; *Lord, &c. vs. Essex B. A.*, No. 4, 37 *Md.*, 320; *Spencer vs. Cooks*, 16 *La. An.*, 153-4; *Harris vs. McGregor*, 29 *Cal.*, 124; *Wheadon vs. Peoria R. R. Co.*, 42 *Ill.*, 494; *Crooker vs. Crane*, 21 *Wendell*, 212.

It will be observed that in several of the cases above referred to, particularly 24 *Howard*, 282; 42 *Ill.*, 494; 21 *Wendell*, 212, the omission or non-performance was not a matter that appeared on the face of the proceedings of incorporation, but was a matter *dehors*, and established by proof. *Hughes vs. Antietam Co.*, 34 *Md.*, 321; *Oler vs. B. & O. R. R. Co.*, 41 *Md.*, 590.

[NOTE.—Other points omitted as not adverted to by the Court.—REPORTER.]

*Isador Rayner*, for the appellees.

BRENT, J., delivered the opinion of the Court.

This is an action of assumpsit to recover from the appellees for merchandise sold, and for which it is claimed they are personally liable. The declaration contains three counts—the first, for goods sold and delivered—the second, for money found due on an account stated, and the third, is a special count.

It is very full and lengthy, but alleges in substance, that the defendants pretending there was a company duly incorporated under the laws of West Virginia, by the name of the Lancaster Furnace and Mining Company, induced the plaintiff to sell certain goods to said company; that the plaintiff afterwards discovered that the company was not in fact incorporated, that for reasons, which are specially set out, the necessary acts and proceedings to constitute a valid incorporation under the laws of West Virginia had not been performed and taken, that the said pretended corporation was but a voluntary unin-

corporated association, the members of which are personally liable for the goods sold to them under the name of the pretended company, and which goods were in fact received by the defendants.

The defendants pleaded, that they were not indebted as alleged, and that they did not promise as alleged.

The incorporation of the defendants under the laws of West Virginia was placed in evidence, and proof offered, tending to show that certain requirements, which the appellant claims were conditions precedent to the incorporation of the defendants, had not been complied with. It was also proved that the goods had been sold and charged to the Lancaster Furnace and Mining Company, and that no claim for them had been made against the defendants personally, until after the failure of that company.

The plaintiff presented two prayers, both of which involved the valid incorporation of this company. But the Court rejected them, and instructed the jury.

*First*, That there is no evidence upon which the jury can find for the plaintiff on the first or second count in the *narr*.

*Second*, That the plaintiff having given in evidence the Statutes of West Virginia, under which the Lancaster Furnace and Mining Company claims to have been incorporated, and the certificate of the Secretary of State of said State, declaring the existence of said corporation, it is incompetent for this Court to inquire collaterally into the validity of said corporation, and the plaintiff cannot recover upon the third and fourth counts in the *narr*.

To these instructions by the Court, and to the rejection of its prayers, the appellant has excepted.

There has been no error alleged, in the argument, in the first instruction granted, and we do not understand the appellant as controverting its correctness. The real question in the case is presented upon the second instruction.



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If the view of the law, as there expressed, is right, the rejection of the instructions asked for on the part of the appellant follows as a matter of course.

As already seen, the incorporation of this company, by the name of the Lancaster Furnace and Mining Company, was obtained under the general corporation laws of West Virginia, in which State its operations as a Mining and Manufacturing Company were to be carried on. We have carefully compared the certificates of its incorporation, authenticated by the Secretary of State and the seal of West Virginia, with the requirements of the laws of that State, and we find that it is in all respects in matter of form in accordance with their provisions. *Code, West Va., ch. 54, secs. 6, 7, 8, 9 and 10, and ch. 53, sec. 62.* The certificate, which is the charter giving to this company a corporate existence, discloses therefore no error upon the face of it, and is before us authenticated in such manner as is declared in the 10th section of the law, above referred to, shall be sufficient evidence of the existence of the corporation. Thus formally incorporated, it went into active operation, under its corporate name, became the owner of land, constructed buildings and apparatus proper and necessary to accomplish the purposes of its organization, and while thus actively engaged, the goods mentioned in the *narr.* were sold and delivered to it by the appellant.

Can the validity of its incorporation be attacked in this suit, by proving *aliunde* the certificate of its incorporation, that certain pre-requisites of the law had not been in good faith complied with? We have found no case, which has allowed this to be done in a collateral proceeding such as the present. The rule seems, from all the authorities, to be well established, that the Courts are bound to regard a company incorporated according to all the required forms of law, as a corporation, so far as third parties are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it. In the case of

*The Proprietors of Charles River Bridge vs. Proprietors of Warren Bridge, and others*, 7 *Pick.*, it is said on page 371, where the question of fraud in the procurement of an extension of the charter of Charles River Bridge is considered, "if fraud was practiced, the charter could be revoked only upon a process of *quo warranto*. \* \* \* The defendants cannot take advantage of the supposed false representations. A man passing over the bridge might as well refuse on the same ground, to pay the toll." So in *Jones vs. Dana*, 24 *Barb.*, 299, it is said, "if the company has in form a charter authorizing it to act as a body corporate, and was in fact in the exercise of its corporate powers at the time of its dealing with the plaintiffs, then it was to them and all third persons, a corporation *de facto* and the validity of its corporate existence can only be tested by proceedings in behalf of the people," and 7 *Wend.*, 553, 6 *Cowen*, 23, and 9 *Cowen*, 194, are cited as authorities. See also, *The River Navigation Co. vs. Neal*, 3 *Hawks.*, 520; *Pres. & Co. of the K. & C. Turnp. Road Co. vs. McConaby*, 16 *Serg. & R.*, 145; *State vs. Carr*, 5 *N. H.*, 371; *S. & T. Railroad Co. vs. Tipton*, 5 *Ala.*, 787; *Duke vs. Cahawba Navigation Co.*, 16 *Ala.*, 372.

The present appellant stands in this case in the attitude of a third person to the company in question, and cannot in the manner attempted, and by the proof offered, impeach its corporate existence. It has been clothed with all the forms of a corporation by the laws of a neighboring State, and was in the exercise and use of the franchises conferred upon it. It was a corporation *de facto* at the time the goods were sold and delivered to it, by the appellant, and its existence as a corporation cannot be collaterally drawn into question.

To permit a recovery against the defendants, and thereby to say that they are to be regarded in law as a voluntary unincorporated association, would be a departure

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from all the cases. The debt was not created with them individually, but with a company acting under a formal incorporation, and in the exercise of its corporate powers. This appellant dealt with it and gave it credit as a corporation. If its assets are not ample to pay, it is the misfortune of the creditor. The exhibition of its incorporation, duly and properly authenticated, has been a sufficient answer to the claim preferred against these defendants, and so far as third parties are concerned, it must be regarded as a corporation, until it is otherwise declared in a judicial proceeding on behalf of the government that created it.

The Superior Court of Baltimore City was therefore, in our opinion, right in rejecting the prayers of the appellant and in granting the instruction that the plaintiff could not recover under the special count in the declaration.

As the instructions of the Court are without error, the judgment will be affirmed.

*Judgment affirmed.*

(Decided 7th March, 1877.)

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ADOLPH ENGLER *vs.* PEOPLE'S FIRE INSURANCE COMPANY OF BALTIMORE.

*Principal and Surety—Notice—Action on the Bond of the Secretary of a Corporation, and questions touching the Construction of the Condition of the bond and the extent of the liability of the Sureties.*

J. S. was appointed secretary of an insurance company, and as such gave the company a bond with two sureties, conditioned that "if the above named J. S. shall faithfully perform his duties as secretary of the said P. F. Insurance Company of Baltimore, during the time he holds said office, and shall

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*account for all the money which shall come into his hands as such secretary, then this obligation to be void, &c."*

By the 4th Art. of the by-laws of the company, after specifying certain duties to be performed by the secretary, he was required "in general to perform such other duties as may be referred to him by the board of directors or the standing committee." In an action on this bond brought by the company against the principal and sureties, to recover certain moneys of the company, which the secretary had received and misappropriated, it was **Held**:

- 1st. That the fact of the execution of the bond, and its remission to and retention by the company, until its production at the trial, was sufficient evidence of its acceptance and approval by the company, and the sureties were not entitled to express notice of its acceptance and approval.
- 2nd. That under the 4th Article of the by-laws, the secretary might have been entrusted with the custody of the funds of the company, and a prayer limiting the responsibility of the sureties to any breach of the duties prescribed in said Article, and excluding the custody or safe-keeping of the funds of the plaintiff as one of those duties, was erroneous.
- 3rd. That the bond upon a fair construction of its terms stipulated for the secretary's honesty and fidelity as an officer of the company.
- 4th. That if the secretary was entrusted with the funds of the company; notwithstanding it was also the prescribed duty of the president to receive the money paid to the company, and to deposit the same, and he was responsible for any failure of duty on his part; that did not relieve the secretary from responsibility for the faithful disposition of any funds confided to his care.
- 5th. That the unauthorized act of the president in entrusting funds to the secretary, could not discharge the secretary from the faithful preservation thereof.
- 6th. That the stipulation of the bond was an undertaking for the fidelity and honesty of the secretary commensurate with the scope of his duties; and the enumeration in the 4th Art. of the by-laws of certain things to be performed by him, did not supersede this obligation which pervaded every department of his official functions.
- 7th. That the company had the right under this stipulation to insist upon indemnity for any deviation from the line of his duty to its prejudice.
- 8th. That the absence of any provision to the contrary, such is the necessary import of the terms of the contract, and the sureties in executing the bond must be held as stipulating to this effect.

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Whilst it is an undoubted proposition, that the liability of the surety is not to be extended by implication beyond the terms of his written contract, by which his responsibility is to be measured, the bond constituting such contract must have such construction given to it as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other.

**APPEAL from the Superior Court of Baltimore City.**

This was an action brought by the appellee against John Siebrecht, as principal, and August Engler and Adolph Engler as sureties, on a bond given for the faithful performance by John Siebrecht, of the duties of the office of secretary of the appellee. The condition of the bond was, "that if the above named John Siebrecht shall faithfully perform his duties as secretary of the said Peoples' Fire Insurance Company of Baltimore, during the time he holds said office, and shall account for all the money which shall come into his hands as such secretary, then this obligation shall be void, otherwise the same shall remain in full force and virtue."

And the 4th Article of the by-laws of the company, defining the duties of the secretary is as follows:

"Art. 4. It shall be the duty of the secretary to attend daily at the office during the business hours of the company, to keep the accounts and books of the company in proper order, and ready for inspection when called upon by either standing committee, to countersign all policies of insurance, renewals of policies and certificates of stock, to countersign all conveyances of real estate and releases of mortgages, and all other papers and acts to which the seal of the company is affixed, to attend the meetings of the board of directors, and keep the minutes of their proceedings, to attend the meetings of the standing committees, and keep the minutes of their proceedings, to report at the monthly meeting of the board of directors a statement of the receipts and disbursements of the preceding month, and half yearly, a full and complete state-

ment of all the property and the effects of the company, to wit: real estate, stocks and bonds, loans on real estate, loans on stocks and United States' bonds, cash on hand, and all debts and claims due to or by the company, to prepare for publication the annual statement, *and, in general, to perform such other duties as may be referred to him by the board of directors or by the standing committees.* The secretary shall give satisfactory security for the faithful performance of his duties, in a sum not less than \$2000, to be approved by the finance committee. In case of sickness of the secretary, the president shall appoint some person to perform the duties of the secretary, until the board of directors shall be convened."

The appellant appeared to the action, and pleaded general performance on the part of his principal, and upon this plea issue was joined.

*Exception.*—At the trial, the defendant offered the four following prayers:

1. If the jury shall find from the evidence that John Siebrecht was appointed secretary of the plaintiff at or about March 9th, 1871, and entered upon the duties of the said office, under the charter and by-laws offered in evidence, and that Art. 4 of said by-laws, prescribes the duties and obligations of said secretary, and that the defendant executed the bond to the plaintiff offered in evidence, to secure the faithful discharge of the office of said secretary, that then the defendant is only responsible for any breach of duty on the part of said secretary, which is contained in the said article prescribing said duty; and if the jury find that the said secretary was entrusted with the care and custody or safe-keeping of the funds of the plaintiff, that then such duty is not within the provisions of said article, and plaintiff is not entitled to recover.

2. The defendant respectfully moves the Court to instruct the jury, that under the charter and by-laws of the plaintiff, offered in evidence in this case, the duties of the

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secretary of the plaintiff are prescribed in Article 3 of the same, and could not be enlarged or varied in any manner, unless the same were referred to him by the board of directors or by the standing committee; and if the jury find that he was entrusted with the safe-keeping and depositing of the moneys of the plaintiff, without the order and direction of said board or standing committee, as above stated, that then any defalcation of said Siebrecht as secretary, is not embraced within the terms and conditions of the bond of said secretary, and the plaintiff is not entitled to recover.

3. That Article 3 of the charter and by-laws of the plaintiff, makes it the duty of the president of the company to receive all moneys paid to the company or plaintiff, and to deposit the same, as stated in said article; and if the jury find that the said president, instead of receiving such money and making said deposit himself, entrusted the funds of said plaintiff to this John Siebrecht, secretary of the plaintiff, for that purpose, that then said president under the said article must be considered as relying upon the personal integrity and capacity of the said John Siebrecht, and not upon the official bond of said Siebrecht, as secretary, given for the faithful performance of his duties as secretary under Article 4 of said charter and by-laws, and the plaintiff is not entitled to recover.

4. If the jury find from the evidence that the defendant made and executed the bond offered in evidence, dated March 9th, 1871, the duties of John Siebrecht, as the secretary of the plaintiff, it then became the duty of the plaintiff to notify the defendant of the acceptance and approval of the same; and if the jury should find that the plaintiff did not give the defendant any such notice until some three years after the same had been made, to wit: about the month of March, 1875, when defalcation or breaches of duty had already been committed by Siebrecht as secretary, then the plaintiff is not entitled to recover.

The Court, (DOBBIN, J.,) refused all of said prayers; to which ruling the defendant excepted.

The jury rendered a verdict for the plaintiff, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., STEWART, BRENT, GRASON, MILLER and ROBINSON, J.

*John C. King*, for the appellant.

The charter and by-laws prescribe the duties and obligations of the secretary, and consequently the bond in question operates only to secure the faithful discharge of his duties as secretary, and the care and custody of the funds of this company are not within the provisions of the article. "A surety can only be charged where the case is brought within the very terms of his contract, and the Court will not go into an inquiry whether the surety has been injured by a departure from those terms." *Smith's Merc. Law*, 582; *Berkhead vs. Brown*, 5 *Hill*, 634, 640; *Edmondston vs. Drake*, 5 *Pet.*, 624, 629; *Dobbin vs. Bradley*, 17 *Wend.*, 422; *Walwrath vs. Thompson*, 4 *Hill*, 200; *Smith vs. Dann*, 5 *Hill*, 543.

The duties of the secretary being prescribed as stated, these duties could not be enlarged in any manner, or raised without the action of board of directors, and the bond of the secretary would not be responsible, because any departure from the express terms of the obligation would discharge the surety.

"If the surety's engagement relates to a particular office, it extends only to such things as were included in the office when the engagement was entered into." *Chitty on Contracts*, 523, (7th Am. Ed.); *Leigh vs. Taylor*, 7 *B. & C.*, 491; *Russell vs. Perkins*, 1 *Mason*, 340; *Barker vs. Barker*, 1 *T. R.*, 287; *Dance vs. Girdler*, 1 *New R.*, 34; 8 *Clarke & Fin.*, 470.

It was the plain duty of the president, under the charter and by-laws, to receive the funds paid in and to deposit



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them; and if instead of discharging that duty so required of him, he entrusted them to the secretary, then the president must be considered to have relied upon the personal integrity and capacity of Siebrecht. The defendant's bond could not be made responsible for any action of the principal on the bond, not embraced strictly within the provisions of the bond itself.

"A surety is entitled to a strict and literal performance by the creditor of the contract, in reference to which the guarantee was given." *Chitty on Contracts*, 529; *Miller vs. Stewart*, 9 *Wheat.*, 680; *Wright vs. John*, 8 *Wend.*, 512; *Bank of Wash. vs. Barrington*, 2 *Penna.*, 29; *Ware vs. Calvert*, 2 *N. & P.*, 126; *Sasscer vs. Young*, 6 *Gill & Johns.*, 243.

The appellant was entitled to notice of the approval and acceptance of the bond before his responsibility can be said to have actually arisen or become effectual.

"When the guaranty is prospective, and to attach upon future transactions and the guarantor is uninformed as to whether his guaranty has been accepted and acted upon or not, it is the settled doctrine in the Courts of the United States that notice of the acceptance must be given within a reasonable time." *Smith's Merc. Law*, 571; *Lee vs. Dick*, 10 *Peters*, 482; *Edmondston vs. Drake*, 5 *Peters*, 624; *Russel vs. Clark*, 7 *Cranch*, 91; *Train vs. Jones*, 11 *Vermont*, 444.

*Fielder C. Slingsluff* and *Frederick W. Brune*, for the appellees.

There is nothing whatever inconsistent with the express terms of by-law No. 4, with the reception by the secretary of money or other valuables belonging to the company. In addition to the duties specifically set forth therein, he was, "in general, to perform such other duties as may be referred to him by the board of directors or by the standing committees."

The objection, therefore, to the appellant's first prayer is, that it instructs the jury that the reception by the secretary of money intrusted to him was not a part of his duty under Art. 4 of the by-laws.

This is false in fact, and the most the appellant could ask was, that this question should be left to the jury. He however, sought to take it away from them.

The second prayer is liable to the same objection. It assumes that the secretary was limited to the strict line of duty as laid out in Art. 4 of the by-laws, and that he had no other duties incident to his office, which were covered by his bond than those specifically set forth in said by-law. It assumes again, that it was necessary, if other duties were referred to the secretary, that the same should be done by formal action and recorded on the minutes of the company.

In addition to his specific duties, he had others, which necessarily arose from his position as secretary, which were the legitimate result of his position and strictly in the line of his duty. The by-laws in general prescribed his duties—but could not specify each act to be done by him. He was an employé as well as a secretary, and his bond covered both capacities.

A bond for fidelity as assistant book-keeper, secures fidelity and honesty as employé as well as good book-keeping. *Rochester Bank vs. Elwood*, 21 N. Y., 88 and 94; *Barrington vs. Bank*, 14 S. & R., 405; *Strawbridge vs. B. & O. R. R. Co.*, 14 Md., 360.

By one of the by-laws of a bank, it was provided that every officer of the bank should perform such services as might be required of them by the president or cashier. A book-keeper gave a bond for the faithful performance of the duties of his office, "and of all other duties required of him in said bank." The book-keeper, while in the discharge of the other duties required of him, took large sums of money. The sureties were held liable. *Planters'*

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*Bank vs. Lamkin, R. M. Charlton, 29; Minor vs. Mechanics' Bank, 1 Peters, 46.*

The answer to the second assumption is, that no possible harm has been done to the sureties by the failure of the appellants to have spread on its record, admitting such to be the fact, the duty of receiving money and depositing the same in bank. The condition of the bond contemplated this duty, in addition to the duties specifically set forth, and the sureties had due notice thereof when they signed the bond. The duty was imposed, and even if it were necessary to take final action of the board or standing committees in the premises, which the appellee denies, the sureties are in no manner placed in any new position by such failure. If no formal act was necessary to accept the bond, surely no formal act was necessary to impose duties which were strictly within the condition of the bond.

The second clause in the prayer instructs the jury to find the sureties not responsible, if they find that the secretary was entrusted with the safe-keeping and depositing of the moneys of the plaintiff, without the order and direction of the board or standing committees.

But if the evidence shows that the defalcation was not due to the fact that money was entrusted to the safe-keeping of the secretary, the jury must still find for the appellant.

The third prayer is based on the theory that the president had no authority to entrust money to the secretary, or to give the same to him to deposit in bank. The secretary was a bonded officer. It was strictly in the line of the duty of a secretary of an insurance company to receive money, and to deposit the same in bank, and unless this ordinary duty is restrained in the by-laws of this appellee in express terms, and the appellant acted in accordance therewith in signing the bond, the appellant can have no case. This seems to be the point most relied on by him to evade his act of suretyship.

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The appellee contends that there is no such restraint in the by-laws, and that it was part of the ordinary duty of the secretary to receive and handle the money of the company. Unless it can be shown that the president of the company was a mere clerk in the office of the company and a runner to the bank, the duty of receiving money must have devolved on the secretary.

The law of the fourth prayer has long since been settled against the view of the appellant. A bond with sureties given by an officer of a corporation for the faithful performance of his duties, and found in the possession of the corporation, the officer having acted in his office, might, as in the case of natural persons, be presumed to be accepted by the corporation, although no vote of acceptance by the directors could be found on the record of the corporation. *Bank of the U. S. vs. Dandridge*, 12 Wheat., 64; *Union Bank of Maryland vs. Ridgely*, 1 H. & G., 324; *Angell & Ames on Corporations*, sec. 252; *R. R. Co. vs. Elwell*, 8 Allen, 371.

STEWART, J., delivered the opinion of the Court.

Exception has been taken by the appellant, to the refusal of his four prayers by the Superior Court of Baltimore City.

The bond of the appellant, upon which the suit was instituted, was admitted to have been executed by him in New York, and sent to the appellee, and to have been in its possession from its execution, until its production in Court.

It was ruled by this Court in the case of the *Union Bank of Md. vs. Ridgely*, 1 H. & G., 324, that in the absence of any evidence to the contrary, the possession and production of such instrument, is sufficient *prima facie* evidence of the delivery and acceptance thereof.

There was consequently no error in the rejection of the appellant's fourth prayer.

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By the 4th Article of the by-laws of the appellee, after specifying certain duties to be performed by the secretary, he was required to discharge such other duties as might be referred to him, by the board of directors or the standing committees.

Under this provision, the secretary might have been entrusted with the custody of the funds of the company, and the first prayer of the appellant could not have been granted without ignoring this obligation, and it was properly refused.

The appellants' second prayer was unsound, and calculated to mislead the jury.

Whilst recognizing the duty of the secretary to take care of the funds of the company referred to him by the directors or standing committee, the appellant sought an instruction, that if the jury found that he was entrusted with the keeping of the money of the company, without such reference, the appellee could not recover. If the proposition was correct to such extent, that would not debar the appellee from recovering for any other breach.

The condition of his bond provides, not only, that he shall account for all money coming into his hands as secretary; but further for the faithful performance of his duty as secretary, embracing not only the care of funds confided to him, but the general discharge of his official duty. In effect and upon a fair construction of its terms, stipulating for his honesty and fidelity as an officer of the company. The prayer was not commensurate with the duty, and there was no error in its refusal.

The third prayer of the appellant was properly rejected.

If the secretary was entrusted with the funds of the company, notwithstanding it was also the duty of the president, under Article 3 of the by-laws, to receive the money paid to the company, and to deposit the same, and who was responsible for any failure of duty on his part; that did not relieve the secretary from responsibility

for the faithful disposition of any funds confided to his care.

The unauthorized act of the president, in entrusting funds to the secretary, could not discharge the secretary from the faithful preservation thereof.

The bond stipulated for the faithful performance of the duty of the secretary. This was an undertaking for fidelity and honesty, commensurate with the scope of his duties ; and the enumeration of certain things by him to be performed by the by-law No. 4, did not supersede this obligation, which pervaded every department of his official functions. It was an engagement that he would not avail himself of his position, to misapply or embezzle any of the funds of the company, or resort to any unlawful or dishonest device, inconsistent with the due and proper performance of his trust.

The company had the right under such stipulation, to insist upon indemnity for any deviation from the line of his duty to their prejudice—unless there was some provision in the bond to the contrary, such is the necessary import of the terms of the contract, and the appellant, his security, in executing the bond, must be held as stipulating to that effect.

Whilst it is an undoubted proposition, that the liability of the surety is not to be extended by implication, beyond the terms of his written contract, by which his responsibility is to be measured ; the bond constituting the contract must have such construction given to it, as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other. *Strawbridge vs. B. & O. R. R.*, 14 Md., 360 ; *Rochester City Bank vs. Elwood*, 21 N. Y., 88 ; *Barrington vs. Bank of Washington*, 14 Ser. & R., 405 ; *Minor vs. Mechanics' Bank*, 1 Peters, 41 ; *Mayne vs. Manhattan Ins. Co.*, 2 Otto, 93.

*Judgment affirmed.*

(Decided 7th March, 1877.)

## AUGUSTUS ALBERT, Sheriff vs. JOSEPH LINDAU.

*Chattel Mortgage—Appropriation of payments—Action against Sheriff for alleged illegal seizure and sale of goods under Executions—Question whether an agreement between two parties constituted the relation of principal and agent for the sale of goods, or that of seller and buyer.*

Because a mortgagee of a chattel temporarily uses it with the assent of the mortgagor, and then returns it to him, the mortgage lien upon it is not thereby extinguished.

To make applicable the rule that in the absence of a specific appropriation of payments by either the debtor or creditor, the law will appropriate them, there must be some testimony tending to show that no such appropriation has been made by the parties.

Parties have right to contract as they please, if their contract be not condemned by the law as against good morals or in contravention of public policy.

J. L. and W. B. L. of the City of Baltimore, entered into the following agreement :

"Whereas, the said W. B. L. is desirous of carrying on and conducting the retail liquor business, at 51 East Lombard street, in said city, but is unable to do so, because of his inability to furnish stock and capital necessary in said business; and whereas, said W. B. L. is without means of his own, the said J. L. has consented to aid him upon the terms and conditions hereinafter named.

"Now this agreement witnesseth, that the said J. L. agrees to furnish and deliver to said W. B. L., as his agent, all such liquors, wines, &c., which he may require in said business, at the usual wholesale prices, so long as it shall be agreeable for him to do so, and said W. B. L. shall faithfully comply with this agreement. It is expressly understood and agreed, however, that said W. B. L. shall conduct and carry on said business only as the agent of said J. L., that the stock in trade furnished as aforesaid shall be and remain the absolute property of the said J. L., and that all goods shall be sold for and on the account of said J. L., and all bills for goods sold

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shall be made out in the name of said W. B. L., as agent aforesaid, and in no other manner; and said W. B. L. shall account to said J. L., at least once a month, for all goods delivered to him under this agreement, and shall pay over the wholesale price of such goods, and retain for his labor and attention in said business such profits as shall be made."

In an action brought against the Sheriff of Baltimore City, by J. L. for an alleged illegal seizure and sale of goods in the store of W. B. L. under executions against the latter, and which goods the plaintiff claimed as his under the above agreement. HELD :

1st. That although there were some features in this instrument of an unusual character, and tending to arouse suspicion as to its *bona fides*, the Court could not pronounce it void upon its face.

2nd. That there was no legal principle which would make void an agreement like this, if executed and carried out in good faith.

3rd. That upon the assumption that it was so executed, and was thus being carried out, and that the goods levied on by the sheriff at the instance of the judgment creditors, were duly furnished under it, and were in the store at the time of the levy, there was no reason why he should not be responsible for seizing and selling them, said creditors having recovered their judgments more than two years before the agreement was entered into.

4th. That the case would be quite different with respect to subsequent creditors, who might be fairly presumed to have been misled by the false credit which such possession and ownership might give.

5th. That under the above assumption the plaintiff was entitled to recover the value of the goods seized, provided the same *did not exceed the amount* owing to him by W. B. L. under the agreement, with interest in the discretion of the jury.

6th. But if the goods were in fact sold to W. B. L. *on credit*, instead of being entrusted to him for sale *as agent*, or if the agreement referred to was merely colorable, not made in good faith, and was intended to be used for the purpose of protecting property, which was actually sold to and belonged to W. B. L. from his creditors, under the guise of an agency, then the goods could be seized on execution both by his antecedent and subsequent creditors.

7th. That if J. L. delivered the goods in the store to W. B. L. at a *fixed price*, being the wholesale market price for such goods at the time of delivery, and charged the same to W. B. L. on his books, and authorized him to sell and dispose of them as if they were his own, and W. B. L. was to receive all the profits of such sales, and *was to sustain all losses* arising therefrom, or which might be incurred by injury to or destruction of the goods, and



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was not to receive any commission or salary, and was *never required to account* for such sales, nor to render any account of the same from time to time, except that he was simply *to pay for the goods*, the prices charged on the books of J. L., (the same being the wholesale price of the same,) and in the bills for the goods sent to W. B. L. by J. L. at the time of delivering the same, and said bills so rendered were in the ordinary form of sale bills, made out to a purchaser of goods,—then there was in effect a waiver or an abandonment of the agency contract, and the protection it would otherwise have afforded to J. L.'s asserted ownership of the goods, and constituted in law a sale of them on credit accompanied by delivery.

8th. That where all the elements of such a sale exist it cannot be made any-thing else by calling it by a different name.

9th. That if the contract with W. B. L. was merely colorable, not made in good faith, but intended to conceal the property from the creditors of said W. B. L. in order to deprive them of his future earnings, the said delivery of said goods as far as the creditors of said W. B. L. were concerned vested the property in said goods, in said W. B. L., and the same could be taken on execution by his creditors.

APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

*Exception.*—At the trial the plaintiff offered the three following prayers.

1. The plaintiff prays the Court to instruct the jury, that if they believe from the evidence before them, that on May 26th, 1870, the plaintiff sold to a certain Wm. B. Lipper, one brown horse and one express wagon, No. 3361, but that the said Lipper did not at that time, nor at any time thereafter, pay to the plaintiff the consideration therefor, and that in order to secure himself for the same he did, on said date, receive from said Lipper the bill of sale offered in evidence, and that the defendant levied upon and sold the same as related in the evidence, that then the plaintiff is entitled to recover the value thereof, provided the sums so recovered shall not exceed the amount still owing thereon from said Lipper to Lindau, (with interest in the discretion of the jury,) unless the jury shall find

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that after the making of said bill of sale, the property in the brown mare referred to therein, was re-transferred to Lindau, in which event the lien created by the bill of sale was lost ; but if they shall find that the substitution of the sorrel mare for the brown mare was only an exchange of use, then such exchange does not impair the plaintiff's right to recover.

2. The plaintiff prays the Court to instruct the jury, that all the evidence in reference to invalidity of the bill of sale must be excluded from their consideration, and that the same is valid as a mortgage for the amount due thereunder.

3. The plaintiff prays the Court to instruct the jury, that if they believe from the evidence before them, the execution of the written agreement offered in evidence, and that Wm. B. Lipper was carrying on business thereunder with the goods of Lindau, at the time the levy in this case was made, and that the defendant had notice of this fact, and that notwithstanding the same, he seized and sold the goods so belonging to said Lindau, then the plaintiff is entitled to recover the value of these goods, provided the same does not exceed the amount owing to him by Lipper under said agreements, with interest in the discretion of the jury.

And the defendant offered the following ten prayers:

1. If the jury find from the evidence that the plaintiff, Lindau, sold and delivered the goods in the store to William B. Lipper, on condition that the goods were to remain the property of Lindau, until they were paid for, but at the same time it was part of the terms of sale and delivery that said Lipper might sell and dispose of said goods as if they were his own, and by the terms of said sale, Lipper was authorized to place said goods in his store for sale to the public, then said conditional sale and delivery vested the property in said goods in Lipper, as far as his creditors were concerned, and the same were liable to be taken on

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execution for his debts, and the jury must find for the defendant.

2. If the jury find from the evidence that the plaintiff, Lindau, furnished and delivered the goods in the store to William B. Lipper, on condition that the same were to become the property of Lipper when paid for, and authorized or permitted said Lipper to put said goods in his store for sale to the public at large, and to take all the profits derived from the sale of them, and he sustain all losses, but that said arrangement for furnishing of said goods to said Lipper was merely colorable, not made in good faith, but intended to conceal the property from the creditors of said Lipper, to deprive said creditors of the future earnings of said Lipper, and that the plaintiff, Lindau, permitted said Lipper to hold himself out as the owner of the same, with the right of disposition, then said delivery of said goods, as far as the creditors of said Lipper are concerned, vested the property in said goods in said Lipper, and the same could be taken on execution by his creditors, and the verdict must be for the defendant.

3. If the jury find from the evidence that the plaintiff, Lindau, delivered the goods in the store of Lipper, at a fixed price, which was the wholesale market price for such goods at the time of delivery, and charged the same to Lipper on his books, and authorized said Lipper to sell and dispose of said goods as if they were his own, and said Lipper was to receive all the profits of said sales, and was to sustain all losses arising therefrom, or which might be incurred by the injury to or destruction of said goods, and was not to receive any commissions or salary, and was never required to account for said sales, nor to render any account of the same from time to time, except that he was simply to pay for said goods, the price charged on the books of the plaintiff, the same being the wholesale price of the same, and in the bills for said goods sent to said Lipper by the plaintiff, at the time of delivering the same,

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and that said bills so rendered, were in the ordinary form of bills of sale made out to the purchaser of goods, then such dealings and transactions between Lindau and Lipper in law, constitute not the relation of principal and agent, but that of seller and buyer, as far as creditors of said Lipper are concerned, and said arrangement as to such creditors, is a sale of the said goods to said Lipper, and as far as the creditors of said Lipper are concerned, vests the property in said goods in Lipper, and the property thus delivered is liable to be taken on execution. for the debts of said Lipper, and the jury must find for defendant.

4. Even if the jury should find that the goods in the store were furnished and delivered by the plaintiff, Lindau, to Lipper, in good faith, and without intent to defraud, and that the said goods were not to become the property of said Lipper until paid for, the burden of proof is on the plaintiff to show that the particular goods taken by the officer, were never paid for by Lipper, and that this is not shown by simple proof of a balance on account due from Lipper to Lindau.

5. Even if the jury find that the plaintiff, Lindau, furnished and delivered the goods in the store to Lipper in good faith, without intent to defraud, on condition that said goods were not to become the property of said Lipper until paid for, it is still incumbent on the plaintiff to show what portion of the particular goods taken by the defendant on execution were not paid for, and if the jury find that the goods not paid for, and claimed as the property of the plaintiff, were commingled with the goods of Lipper in the store which had been paid for, so as not to permit of separation and identification, and said goods not paid for were permitted by the plaintiff, Lindau, to remain in the store of said Lipper, under his control, with the right upon the part of said Lipper, to sell and dispose of the same as his own, and there was no attempt at the time of taking the goods on execution to point out to the officer

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the particular goods not paid for, and claimed therefore by the plaintiff, and said officer had no knowledge of the same, then the plaintiff is not entitled to recover.

6. If the jury find from the evidence, that the horse mentioned in the bill of sale offered in evidence, was the property of said Lipper, and by him subsequently exchanged for a sorrel horse with the plaintiff, and that the plaintiff two or three years after such exchange, re-delivered said horse mentioned in the bill of sale to said Lipper as his own, relying on said bill of sale as a security for the same by way of mortgage, then said bill of sale does not cover said horse, and the plaintiff is not entitled to recover therefor.

7. That if the jury find that the purpose of the agreement offered in evidence between Lindau and Lipper, by which said Lindau was to furnish said Lipper with goods at fixed prices, to be sold by said Lipper, and for his sole benefit, he to retain all the profits arising from said sale, and also with the horse and wagon with which to carry on his business as a merchant in effecting said sales, and which were accompanied with delivery in each case, but the title to all these to remain in said Lindau until paid for, was to deprive the creditors of said Lipper of their legal remedies against said goods, and horse and wagon, for the payment of their debts, or of the future earnings of said Lipper, then such agreement was void and fraudulent as to creditors, and all acts done, or transactions had in pursuance of said purpose, are to be regarded as but one act, no matter in what order they occurred, and the plaintiff is not therefore entitled to recover for any of the said goods or horse and wagon delivered to said Lipper in pursuance of said purpose.

9. That if the jury find from the evidence that at the wholesale prices of the goods on hand and levied upon and sold in this cause, their value exceeded the amount of indebtedness from said Lipper to said Lindau at that time,

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the goods represented by said excess were the property of said Lipper, and liable to execution by his creditors; and if they find said goods were so intermingled with the residue of said goods as to be incapable of separation, or were not separated and pointed out to the sheriff, then the whole of said goods were liable to execution, and the plaintiff is not therefore entitled to recover for any part thereof.

10. That if the jury find from the evidence that subsequent to the making of the agreement of August, 1873, offered in evidence, the plaintiff furnished said Lipper with goods under the circumstances given in evidence, and at fixed or wholesale prices, and charged him on running account therefor, and credited him with payments made from time to time, and there was no special appropriation of said payments by said Lipper or Lindau, the laws appropriates said payments to the oldest accounts, and by such operation of law, therefore, all the goods previously purchased to those whose valuation at wholesale prices equaled the amount of indebtedness due by said Lipper to said Lindau at the time of said levy, or were in excess of said amount of indebtedness, were the property of said Lipper, and if they shall find that said goods of Lipper were so intermingled with the other levied upon as to be incapable of separation, or were not properly designated or pointed out to the sheriff at the time of making said levy, the plaintiff is not entitled to recover for any of such goods.

11. That if the jury find from the evidence that the horse and wagon levied upon and sold in this cause, were the same as that described in the mortgage bill of sale offered in evidence, and that subsequent to the execution of said mortgage, and the execution of the mortgage bill of sale covering said stock of goods, also offered in evidence, the plaintiff furnished and delivered to said Lipper, goods under the circumstances testified to in this cause, and charged him on running account therefor, and said

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Lipper made payments from time to time as he was able, and which said payments were not specifically appropriated by said Lipper or Lindau, the law appropriates said payment, first, to the payment of the amounts due on account of said mortgages; and if they shall find that the total amount of said payments at any time equaled or exceeded the amount of the considerations of said mortgages, then both of said mortgages were satisfied and discharged, and the plaintiff is not entitled to recover for said horse and wagon.

The Court (DOBBIN, J.,) granted the said three prayers of the plaintiff, and refused all of the prayers of the defendant. The defendant excepted.

The jury rendered a verdict for the plaintiff, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER and ROBINSON, J.

*John K. Cowen* and *Wm. Daniel*, for the appellant.

*Isador Rayner*, for the appellee.

MILLER, J. delivered the opinion of the Court.

The appellee, Lindau, sued the appellant, the Sheriff of Baltimore City, in *trover*, for seizing, carrying away and converting to his own use a lot of wines and liquors, and a horse and wagon alleged to be the property of the plaintiff. It appears from the record, the sheriff seized these goods and chattels under executions on certain judgments, against William B. Lipper, recovered in March, 1871. The levy was made on or about the 5th of October, 1874, and the property was sold by the sheriff after due advertisement on the 22nd of that month. The plaintiff claimed the horse and wagon under a bill of sale thereof to him from Lipper dated the 26th of May, 1870, and duly recorded

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two days thereafter. Just prior to the levy of these executions this bill of sale had been decreed to be a mortgage, to secure the consideration of \$300 therein expressed by the Circuit Court of Baltimore City, upon a bill filed by these judgment creditors against Lindau, Lipper and others for the purpose of having the same, with other conveyances made by Lipper, set aside as fraudulent and void as against his creditors. The other goods the plaintiff claimed under a private contract or agreement between Lipper and himself dated the 27th of August, 1873, which we shall notice more particularly hereafter.

1st. As to that part of the case which relates to the horse and wagon, we find no substantial error in the rulings which the Superior Court gave on that subject. The evidence shows that after the bill of sale was executed, Lindau allowed Lipper, at the latter's request, to change horses and have another instead of the one mentioned in the bill of sale, because the latter shied and would not go near a locomotive, and that Lindau received, and for a time, used this horse, but this exchange was afterwards revoked, and Lipper again received from Lindau the horse mentioned in the bill of sale, and had him in possession at the time he was seized by the sheriff. In granting the plaintiff's first prayer the Court instructed the jury, that if they found that the horse mentioned in the bill of sale was *re-transferred* to Lindau, then the lien thereon credited by the bill of sale was *lost*, but if they found this substitution of horses was only an *exchange of use*, then such exchange does not impair the plaintiff's right to recover. If the jury under this instruction found, as by their verdict, it appears they did, that this transaction was a mere temporary exchange of the use of these two horses, it is clear the appellant has no cause of complaint, for there is no principle of law which declares that if a mortgagee of a chattel, temporarily uses it with the assent of the mortgagor and then returns it to him, the mortgage



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lien upon it is thereby extinguished. Nor was the appellant injured by the granting of the plaintiff's second prayer, by which the jury were instructed they must exclude from their consideration, all evidence in reference to the invalidity of the bill of sale, and that the same is valid as a mortgage for the amount due thereunder. Outside of the proceedings and decree in the equity cause, there is nothing to show that this instrument was other than an absolute conveyance as it purports to be on its face. By treating it as a mortgage the appellant derived the benefit of a credit thereon, which he would not otherwise have been entitled to claim. Again conceding the position taken in the appellant's eleventh prayer, that if the payments made by Lipper to Lindau were not specifically appropriated by either of them, the law will appropriate them first to the amount due on the mortgage to be correct. Still there must be some testimony tending to show, that no such appropriation had been made by the parties themselves. But the evidence is all the other way, and shows that the \$75 was paid *on account* of the horse and wagon, and that the other payments were made *on account* of the goods. For these reasons we find no error in the Court's action upon the plaintiff's first and second, and the defendant's sixth and eleventh prayers.

2nd. The contract under which the plaintiff claims the other goods sold by the sheriff, is in writing, signed by both parties thereto, and is as follows:

"This agreement made this 27th day of August, 1873, by and between Joseph Lindau and William B. Lipper, both of the City of Baltimore and State of Maryland: *Whereas*, the said William B. Lipper is desirous of carrying on and conducting the retail liquor business at 51 East Lombard street in said city, but is unable to do so because of his inability to furnish stock and capital necessary in said business: and *whereas*, said Lipper is without means of his own, and the said Lindau has consented

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to aid him upon the terms and conditions hereinafter named. Now this agreement witnesseth that the said Joseph Lindau agrees to furnish and deliver to said Lipper, as his agent, all such liquors, wines, &c., which he may require in the said business at the usual wholesale prices so long as it shall be agreeable for him to do so, and said Lipper shall faithfully comply with this agreement. It is expressly understood and agreed however, that said Lipper shall conduct and carry on said business *only as the agent* of said Lindau, and the stock in trade furnished as aforesaid shall be and remain the absolute property of the said Lindau, and that all goods shall be sold *for and on account of said Lindau*, and all bills for goods sold shall be made out in the name of said Lipper, *as agent aforesaid* and in no other manner; and said Lipper shall account to said Lindau at least once a month, for all goods delivered to him under this agreement, and shall pay over the wholesale price of such goods, and retain for his labor and attention in said business such profits as shall be made."

There are some features in this instrument of an unusual character, and tending to arouse suspicion as to its *bona fides*, but we cannot pronounce it void on its face. It is in substance an agreement by which Lindau, who appears to have been a wholesale liquor dealer, was to furnish a stock of goods to Lipper, in order to enable the latter to carry on a retail liquor business, as *agent* for the former, with power to sell the goods *for and on account* of his principal. The agent was required to render monthly accounts of the goods delivered to him under the agreement, and sold by him, and to pay over to his principal the wholesale price thereof, and instead of being paid for his services in the usual way, by a salary or commissions on sales, the agent was authorized to retain for his labor and attention in the business, what profits he could make by selling at retail. Parties have the right to contract as they please, if their

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contracts be not condemned by the law as against good morals, or in contravention of public policy, and we know of no legal principle, which would make void an agreement like this, if executed and carried out in good faith. Upon the assumption that it was so executed, and was thus being carried out, and that the goods levied on by the sheriff, at the instance of these judgment creditors, were duly furnished under it, and were in the store unsold at the time of the levy, we see no reason why he should not be made responsible for seizing and selling them. It must be remembered that these creditors had recovered their judgments more than two years before this agreement was entered into, and, therefore, could not possibly have trusted Lipper, by reason of his possession and apparent ownership of these goods. The case would be quite different, with respect to subsequent creditors, who might be fairly presumed to have been misled by the false credit which such possession and ownership might give. We are, therefore, of opinion there was no error in the granting of the plaintiff's third prayer. The law of that instruction is, that if the jury find the execution of this agreement, and that Lipper was carrying on business *thereunder* with the goods of *Lindau*, at the time this levy was made, and the sheriff had notice of this fact, and notwithstanding the same, seized and sold the goods so belonging to *Lindau*, then the plaintiff is entitled to recover *the value* of these goods, provided the same *does not exceed the amount* owing to him by Lipper under the agreement, with interest in the discretion of the jury. In this aspect of the case, and in view of the granting of this instruction, the Court was right in rejecting the defendant's fourth, fifth, ninth and tenth prayers. The question argued at bar, as to an intermixture of the goods obtained from *Lindau*, with those belonging to Lipper, and which he had obtained from other sources, is not presented by any of the defendant's prayers, and even if it were, we find in the record no evidence that

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such goods had been so intermingled, as to be incapable of separation and identification.

But in our opinion, there is another view to be taken of this branch of the case. If these goods were in fact *sold* to Lipper *on credit*, instead of being entrusted to him for sale *as agent*, or if the agreement referred to was merely colorable, not made in good faith, and was intended to be used for the purpose of protecting property which was actually sold to and belonged to Lipper from his creditors, under the guise of an agency, then we think it is quite clear the goods could be seized on execution, both by his antecedent and subsequent creditors. Thus, if the facts were, as stated in the defendant's third prayer, that Lindau delivered the goods in the store to Lipper, at a *fixed price*, being the wholesale market price for such goods at the time of dealing, and charged the same to Lipper on his books, and authorized Lipper to sell and dispose of them as if they were his own, and that Lipper was to receive all the profits of such sales, and *was to sustain all losses* arising therefrom, or which might be incurred by injury to or destruction of the goods, and was not to receive any commissions or salary, and was *never required to account* for such sales, nor to render any account of the same from time to time, except that he was simply *to pay for the goods*, the price charged on the books of Lindau, (the same being the wholesale price of the same,) and in the bills for the goods sent to Lipper by Lindau, at the time of delivering the same, and that said bills so rendered, were in the ordinary form of sale bills, made out to a purchaser of goods, then in our judgment, there was in effect a waiver or abandonment of the agency contract, and the protection it would otherwise have afforded to Lindau's asserted ownership of the goods, and constituted in law a sale of them on credit, accompanied by delivery. Where all the elements of such a sale exist, it cannot be made anything else by calling it by a different name. We

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are, hence of opinion, that upon the finding of these facts by the jury, the plaintiff could have no cause to complain of the conclusion of law stated in this third prayer, viz., that such dealings and transactions between these parties in law, constitute, not the relation of principal and agent, but that of seller and buyer, so far as creditors of Lipper are concerned, and this arrangement, (which we understand to mean the course of dealing, and the facts above stated, and not the written contract of agency,) as to such creditors is a *sale* of the goods to Lipper, and vests the property in them in him, and renders them liable to be taken on execution for his debts. So, again, if the jury found the other facts stated in the defendant's second prayer, and that the contract with Lipper was merely colorable, not made in good faith, but intended to conceal the property from his creditors, in order to deprive them of his future earnings; we think the plaintiff cannot complain of the legal conclusions stated in that prayer. There is evidence in the record, (as to the weight of which we of course express no opinion,) legally sufficient to submit to the jury, the finding of the facts stated in these two instructions, and in our judgment, it was error to reject them. We are also of opinion, from all that the record discloses, that the defence as to these goods, if it can be made out at all, must rest upon the facts and legal propositions contained in these two prayers, and that there was no error in rejecting any of the others offered on the part of the defendant. An additional, and also fatal objection to the defendant's seventh prayer is, that it connects the horse and wagon with the goods, whereas the plaintiff's title to the former rests upon the recorded bill of sale, and we have shown that that title is open to none of the objections that have been urged against the title to the goods.

The exception to the ruling on the admissibility of evidence contained in the first exception, is not noticed in the

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brief of the appellant's counsel, nor was it referred to in their oral argument at bar. We shall therefore treat it as having been properly abandoned.

*Judgment reversed, and  
new trial awarded.*

(Decided 7th March, 1877.)

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DAVID WILSON and EBEN B. HUNTING, trading as  
WILSON & HUNTING vs. ELIZABETH C. JONES and  
GEORGE F. JONES, Trustee.

*Non-Liability of the Separate Estate of a Married Woman  
for debts not contracted with direct reference to that Estate.*

In order to charge the debts contracted by a married woman upon her separate estate as a lien in equity, it is necessary that it should affirmatively appear, that her contract was made with direct reference to her separate estate, and that it was her intention to charge the same.

A bill was filed against a *fême covert* and her trustee for the purpose of charging her separate estate with a lien for materials furnished by the complainants for the improvement of the same; the bill did not aver that there was any contract by her to bind her separate estate, or any intention on her part to create a charge or specific lien thereon for the payment of the complainant's claim. On demurrer to the bill, it was **Held** :

That the bill stated no case entitling the complainants to relief in equity, and that the demurrer should be sustained.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., GRASON,  
MILLER, ALVEY and ROBINSON, J.

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Wilson & Hunting vs. Jones, et al.

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*Luther M. Reynolds* and *Orville Horwitz*, for the appellants.

And the question before the Court now is, will equity in this State enforce, as against a house and lot, belonging to the separate estate of a married woman, over which she has the power of a *fême sole*, the payment of a debt contracted by her, in parol, for the materials she used in building the house, where the house greatly enhanced the value and amount of her separate estate?

This Court has never had an occasion to pass upon such a case, in all respects. In cases however, involving the same doctrine, this Court has said as in *Norris vs. Lantz*, 18 Md., 269, "except in regard to the separate property of a *fême covert*, all her contracts are null." In *Koontz vs. Nabb*, 16 Md., 555, "A married woman may act in reference to her separate estate as a *fême sole*, when the settlement contains no limitations."

On the subject of intent of the wife to charge her separate estate, in *Yale vs. Dederer*, 22 N. Y. R., 450, the Court say, "the intention must appear in the contract, or the *consideration* of the contract must be for the benefit of the estate itself." At page 460, "If contracted for the benefit of the estate, it would, of course, become a charge; upon the well founded presumption the parties so intended in analogy to the doctrine of equitable liens for purchase money." In *Stinson vs. Prescott*, 15 Gray, 325, the Courts of Massachusetts have adopted the law of that case.

In *Owen vs. Cawley*, 42 Barbour, 105, the husband acting for the wife, by parol, employed counsel to sue for and collect claims due her in her business. Page 118, the Court say, "this separate estate is liable to pay the attorney's fees, though they failed to realize any of the claims she gave them to collect."

In *Oswald vs. Moore*, 19 Ark., 257; the wife employed counsel to prosecute a divorce against her husband. The

Court decided her counsel fees were a charge upon her separate estate. In *Batchelder vs. Sargant*, 47 *N. H.*, 262, the contract was for cattle to supply a farm the wife was cultivating.

The Court say, page 265, in respect to implied promises of the wife, and promises not in writing, the modern cases hold there can be no solid ground for distinction between such cases and promises in writing, and that Courts will decree payment in both class of cases alike. See *Conn vs. Conn*, 1 *Md. Ch. Dec.*, 218, where the Chancellor says, this contract can be shown by parol.

In *Greenough vs. Wiggenton and Wife*, 2 *Iowa*, 435, Greenough contracted in parol with husband and wife to erect a house on her lot in Burlington. Wiggenton and wife demurred, and on appeal the Court say, (page 438,) "It would be rank injustice for the wife to enter into such engagements as secure valuable improvements on her separate estate, and then by demurrer exempt it from liability for these improvements."

On the subject of the husband uniting with the wife in the contract, *Mayer vs. Symmes*, 19 *Ind.*, 119, the statute requiring the co-operation of the husband to encumber or convey the wife's property is like that of Maryland, except it says the wife cannot encumber her property without her husband.

In that case, the wife by parol, employed counsel to recover by suit, her share of her father's estate. Afterwards counsel filed a bill against her separate estate for fees for services rendered in that suit. It was contended on demurrer to the bill, that her separate estate could not become liable expressly or by implication for the payment of these fees, but the Court on appeal, held, pages 119 and 120, "that the statute forbidding the encumbrancing, &c., &c., of the wife's property without the concurrence of the husband, had relation to such acts of conveyance, encumbrance, &c., &c., as previously required the signa-



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ture of the husband; and that a married woman had the right on general principles to bind her separate estate for the payment of debts contracted for the benefit of the estate." "We do not think," said the Court, "it was the intention of the Act to abrogate any right or power she had in reference to her property at the time of its passage."

See 5 *C. E. Greene*, 119. There a married woman could not convey or encumber her property without her husband, and yet her separate mortgage was held to constitute a charge.

In *Gardner vs. Gardner*, 7 *Paige*, 112, the husband loaned the wife \$2000, and took her bond for the payment of the money. After his death she administered, and then told the Orphans' Court she used this money in the purchase of lots for her separate estate, and in improving the same. The Court, (page 116,) say her estate is chargeable in equity for any debt she may contract for the use of her separate estate, and if she borrowed the money, and applied it to the use of her separate estate, the estate is liable. *Vide the same case on appeal*, 22 *Wend.*, 527.

In *Wells vs. Thorman*, 37 *Conn.*, 318, the wife made a parol contract with Wells to put a new front in her store and fix it up. The bill not being paid, Wells filed his bill, and the Court say, (page 319,) "she made the contract for this work through her husband, and the work was performed for the benefit of her separate estate, and it had that effect. We deem these facts sufficient in equity to charge her separate estate."

Nor is this class of cases affected by our married woman's Act. The Act says she shall hold the property for her separate use, with the power of devising the same as though she were a *fême sole* or she may convey the same by joint deed with her husband. All this law did, was to authorize her to acquire property for her separate use, without the intervention of a trustee, and to devise it with-

out the consent of her husband. The restriction in reference to the conveyance of her property, the Act left her as it found her. Her husband since the Act performs the office of her trustee before. It took no power from her, nor did it confer any new power upon her in that respect.

To say she cannot *convey* her property, except by joint deed with her husband, does not even suggest the notion, she cannot do any act at all, concerning her property, without his concurrence. It is a mistake to suppose the modification, restriction, or even the taking away of a larger power, i. e., that of conveying property, affects in any way the right to exercise lesser powers.

Let it be supposed then, that before the Act, a married woman had the power to charge her separate property, and also the power to convey it, would the Act restraining her in the power to convey, affect in any degree her power to charge?

In the case on trial, however, we do not look to the Act for the power of Mrs. Jones to charge or convey her property—we look to the bill. By the bill she not only held her property for her separate estate with the power of devising it as a *fême sole*, but she held it with *all* of the *rights and powers* in reference to it of a *fême sole*.

The law of all the cases above mentioned, applies to married women holding property as their separate estate only. Mrs. Jones held her property, not only as her separate property, but she possessed a power over it, which none of the women named in those cases had over their property. Her ownership was coupled with the dominion and power of an unmarried woman.

If then it be true, she held it with all of the rights and powers that a single woman could have held it, for what rights or powers, or the exercise thereof, could she have been indebted to her husband.

Whatever may then be the *disabilities* of Mrs. Jones touching her separate estate generally, it will not be denied

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that in reference to her separate property involved in the suit, she was clothed with all the *abilities* of a *fême sole*. If it be asked what means the language "with all the rights and powers of a *fême sole*;" it is answered by asking what means the language of the Act "with the power of devising the same as though she were a *fême sole*." Just as any other married lady has, by the Act, the simple and single power of devising her separate property as a *fême sole*, so has Mrs. Jones, by her deeds, all the powers of a *fême sole* in reference to her separate property.

*Jesse N. Bowen* and *Wm. Shepard Bryan*, for the appellees.

In *Koontz vs. Nabb*, 16 Md., 549, it was decided, "that a married woman having a separate estate cannot affect that separate estate, unless the obligation sought to be enforced, presents upon its face some evidence of the intent to charge the estate, or there be evidence *aliunde* tending to prove such intent;" page 554. In this case no such intent is alleged, or even intimated, and therefore the separate estate is not affected.

The debts charged upon separate estates of married women, have been declared by this Court as equitable liens, (*Hall vs. Eccleston*, 37 Md., 521,) to be enforced "as being somewhat in the nature of equitable mortgages." And the power to impose these charges is deduced from the power of disposition; and hence it is declared in the same case, (page 520.) that the wife may, acting *jointly with her husband*, charge her separate estate; and it is further said that there was no restriction on the wife's power to charge, "*provided it be done with the concurrence of her husband*." In the case at bar, there was no concurrence of the husband in the alleged contract.

The fourth section of the Statute of Frauds, requires all contracts to be in writing which affect lands, or any interest in them. As the supposed contract averred in this case

would, if established, create an equitable lien on land, it ought to have been in writing.

No doubt the rule in Maryland on the subject of charging separate estates for debts is different from that which prevails in England, and in the other States of the Union. This Court, in *Koontz vs. Nabb*, expressly rejected the rule which has been growing up in England since 1776, and which has been adopted with more or less variation in many of the States. In England there has been a general tendency toward regarding a married woman, in all respects, as a *fême sole*, in reference to her separate estate; and under the silent influence of this principle many decisions have been made, which are incompatible with the legislation and decisions of Maryland. A number of these cases are referred to in 2 *Story's Equity Jurisprudence*, (new edition,) secs. 1401, et seq., and in notes.

The charges in the bill of complaint are vaguely set forth. If materials purchased from the appellants were used in the building of houses, there was nothing to prevent them from filing a mechanics' lien; but his failure to adopt the remedy given by the law, cannot change the nature of the transaction, or enable him to invent a remedy for himself.

BARTOL, C. J., delivered the opinion of the Court.

This bill of complaint was filed by the appellants for the purpose of charging the separate estate of the appellee Elizabeth, who is a married woman, with the payment of a debt alleged to be due from her to the appellants. The appellees demurred to the bill, and this appeal is from the decree of the Circuit Court sustaining the demurrer and dismissing the bill.

The bill of complaint alleges that Elizabeth C. Jones, a married woman, was during the years 1872, 1873 and 1874, seized or possessed in her own right, or through the intervention of her trustee, George F. Jones, of several

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lots of ground in Baltimore City, and being so seized and possessed of said ground, as and for her sole and separate estate with all the rights, and powers in reference to the same, of a *fême sole*, erected and built thereon, during those years, a large number of houses adapted to the uses of stores, dwellings and the like, and that she did thereby greatly enhance the value and amount of her said separate estate.

That the said Elizabeth with the view of so improving her said separate estate, in order to enable her to erect her said houses, or many of them, during those years purchased of the complainants lumber and other materials, which she used in said houses or many of them, which lumber and other materials with the prices for which the same were sold, are set forth in a bill of particulars filed and exhibited as a part of the bill of complaint. It is further alleged that after building several of the houses, the said Elizabeth has sold the same to other persons who now own and hold them; but that she still holds and owns twenty, if not more of the houses and lots of ground appurtenant thereto that are described or referred to in a certain paper writing exhibited with the bill of complaint.

It is further alleged that the said Elizabeth is now indebted to the complainants in the sum or balance of \$2182.06 together with interest thereon; for which it is alleged her said separate estate is liable; but inasmuch as she is a *fême covert* their said claim can be enforced only in a Court of Chancery; and the bill prays that the same may be declared to be a charge upon the separate estate, and that so much thereof as may be required for that purpose, may be subjected to the payment of complainants' claim and interest thereon.

It is not alleged in the bill that it was any part of the contract, upon which the lumber and materials were furnished, that the same should be a charge or lien upon the property, or that there was any such purpose or intention on the part of Mrs. Jones.

The claim, as it is made by the bill of complaint, is a simple contract debt due from Mrs. Jones to the appellants, and the only equitable ground upon which the specific lien is claimed, is that the lumber, &c. for which the debt was contracted, was used in the construction of the houses, and that thereby the separate estate was enhanced in value.

In the present state of the law in Maryland, it is very clear that this claim cannot be supported. The law has been settled by the case of *Koontz vs. Nabb*, 16 Md., 549. In that case Mrs. Nabb a married woman having a separate estate, purchased a horse to be used upon the farm and gave her promissory note to secure the purchase money; the bill was filed to make her separate estate responsible for its payment; but the bill was dismissed, this Court said "we have carefully examined the decisions in England and in this country, and have reached the conclusion, that a married woman having a separate estate, cannot affect that separate estate, unless the obligation sought to be enforced presents upon its face some evidence of the intent to charge the estate, or there is evidence *aliunde* tending to prove such intent." This was there declared to be the well established doctrine in the chancery jurisprudence of England, for many years before our separation from that country, which remained undisturbed until the decision of *Hulme vs. Tenants*, 1 Brown's Ch. Cases, 16, in 1778.

Since that time, the doctrine has undergone much change in that country, and many modern decisions there, some of which are cited in *Koontz vs. Nabb*, and others referred to in 2 *Story's Eq. J.*, secs. 1400, 1401 (notes,) will show that the tendency of the decisions in England has been to hold that the general engagements of a married woman will bind her separate estate, without any express contract to that effect, or any expression of intention to charge the estate. Without referring to these cases more

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particularly, we consider the doctrine in this State is too well settled to be changed, except by the Legislature; that in order to charge the debts contracted by a married woman upon her separate estate, as a lien in equity, it is necessary that it should affirmatively appear her contract was made with direct reference to her separate estate, and that it was her intention to charge the same.

We refer to *Conn vs. Conn*, 1 Md. Ch. Dec., 212, cited and approved by this Court in *Koontz vs. Nabb*; see also 2 *Story's Eq. J.*, secs. 1398, 1401.

The bill of complaint in this case does not aver that there was any contract by Mrs. Jones to bind her separate estate, or any intention on her part to create or charge a specific lien thereon for the payment of the appellants' claim.

It states no sufficient case entitling the appellants to relief in equity, and the demurrer therefore was properly sustained.

The Code, Art. 51, secured to the appellants a remedy, by which they might have established a lien upon the property, but they have not chosen to pursue that remedy. The provisions of the lien law do not, in our opinion, furnish any reasons in support of this bill of complaint, the inference from the appellants' omission to claim their lien under the Code, would rather be that it was not the intention of the parties that any specific lien should be created upon the property, but that the appellants trusted entirely to the personal engagement of Mrs. Jones.

The decree of the Circuit Court will be affirmed.

*Decree affirmed.*

(Decided 8th March, 1877.)

JAMES BOYCE *vs.* THE TRUSTEES OF THE TOWSON-TOWN STATION OF THE M. E. CHURCH.

*Corporations de jure and de facto—Plea of nul tiel Corporation—Distinction in the Act of 1868, ch. 471, between Religious Societies and Religious Corporations—Corporations cannot be created by Estoppel.*

The Act of 1868, ch. 471, in its 14th section provides among other things for the incorporation of religious societies, and by secs. 156, 162, 163 and 164, for religious corporations. **Held:**

That these last provisions are more especially applicable to the organization of a church, religious society, or congregation of whatever denomination, and it is to be presumed were intended for such purpose.

Amongst other requisites to constitute a religious corporation, church, religious society or congregation under these last sections, it is provided that the agreement for that purpose should be acknowledged by the trustees or a majority of them, before two justices of the peace of the county or city in which the church, congregation, or society, or the greatest number of the members shall reside, or before a Judge of the Circuit Court, or of the Supreme Bench of Baltimore City, and certified by the said Justices or Judge according to the directions of section 163. **Held:**

That no authority having been given to the Judge by these provisions to determine that the provisions of law have been complied with, his certificate is no sufficient evidence of that fact.

In a suit against a religious corporation, where the certificate of incorporation was defective and insufficient to show that the defendant was a corporation. **Held:**

- 1st. That the fact that it held itself out as a corporation, and treated with the plaintiff as such, did not estop it from denying its liability as a corporation.
- 2nd. That the statute law of the State having expressly required certain prescribed acts to be done to constitute a corporation, the omission of those requisites cannot be supplied by the application of the doctrine of estoppel.



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APPEAL from the Court of Common Pleas.

This was an action of assumpsit brought by the appellant against the appellee. The defendant appeared by counsel, and filed the three following pleas.

1. That the defendants are not and never were a body corporate, as alleged.

2. And for a second plea, the defendants say, that the defendants never were indebted as alleged.

3. And for a third plea, the defendants say, they did not promise as alleged.

Upon these pleas the plaintiff joined issue.

*First Exception.*—The plaintiff, James Boyce, sworn on his own behalf, was the first witness called on either side, and immediately after being sworn was about to state what took place at an interview between himself and Oliver P. Merryman and John T. Ensor, in the year 1871 or 1872, the plaintiff's counsel at the same time offering to show the precise mode in which the assistance and aid of said plaintiff were sought, and the acts which were done by the plaintiff in consequence thereof, and stating their intention to follow up this proof by establishing that the defendant is a body corporate, and that the said acts were accepted and acquiesced in by said defendant, and to rely upon the conduct and wrong-dealing of the defendant with the plaintiff and others, as estopping it from denying its incorporation.

The plaintiff then, in support of the first issue, and in order to show acts of user of the corporate name and franchise of the defendant, and for other purpose under the other issue, offered to read in evidence a mortgage from the Trustees of Townsontown Station of the Methodist Episcopal Church to Francis A. Crook and Philip Hiss, trustees.

And also a deed from John T. Ensor, trustee, to said trustees for the property, upon which has been erected the church building mentioned in the bill of particulars filed.

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in this cause, stating that the plaintiff would follow up this proof by the execution of another mortgage by the said trustees under said name, and proof of other acts of user of said corporate name and franchise; to the introduction of which evidence the defendant objected and the Court (GAREY, J.) sustained said objection, and refused to allow said evidence to be produced before the jury. The plaintiff excepted.

*Second Exception.*—The plaintiff then proved by himself, testifying in his own behalf, that he was called upon in the year 1871, by John T. Ensor and O. P. Merryman, who represented to him that the building committee was unable to go any further in the construction of the Methodist Church, at Townsontown, and that they wanted him to go into the building committee, he declined; Mr. Merryman then said that he would not go into the committee, unless plaintiff did so; the plaintiff then said that Merryman would be a valuable member, and he would consider the proposition further. A meeting was then held between the plaintiff, Ensor, Merryman, H. L. Bowen and others, at the counting-room of the plaintiff in Baltimore City, when various propositions occurred. Finally, he agreed to go upon the committee with Ensor, Merryman, Bowen and another. They then determined to borrow money from the Preachers' Aid Society, \$10,000. The application was made and declined, as it would not loan on the church, but the society offered to loan on the plaintiff's own note for the amount. The plaintiff finally gave his own note, and obtained the money, taking from Ensor, Bowen, Merryman and Emory, their obligations for \$2,000 each, secured by mortgage of their respective properties. For the purpose of raising more money, a mortgage was executed on the church to secure certain bonds.

The plaintiff then proposed to read in evidence said mortgage, and one of the bonds; offering to follow up the testimony so offered by proof, that a part of the money for

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which this suit was brought, was paid by plaintiff, he receiving at the time against it some of said bonds. To which evidence the defendant objected, and the Court sustained the objection. The plaintiff excepted.

*Third Exception.*—The plaintiff then offered to read to the jury a paper writing, as the certificate of incorporation of the defendant, as follows:

*Incorporation of Trustees of Towsontown Station, Methodist Episcopal Church:*

*Whereas*, by an Act of the General Assembly of the State of Maryland, approved March 30th, 1868, chapter 471, it is provided, that in every church or religious society, or congregation, of whatever sect, order or denomination, or which shall at any time hereafter be known and acknowledged in the State, and protected in the free and full exercise of its religion by the Constitution and laws thereof, there shall be sufficient power and authority in all persons above twenty-one years of age, belonging to any such church, society or congregation, to elect, at their discretion, certain sober and discreet persons, not less than four nor more than twelve, which persons so elected, upon being registered, as hereinafter directed, shall be constituted a body politic or corporate, to act as trustees in the name and behalf of the particular church, society or congregation for which they are respectively chosen, to manage the estate, property, interest and inheritance of the same. Now, therefore, we, the subscribers, members of Towsontown Station, Methodist Episcopal Church, assembled in pursuance of notice, being part of a religious denomination, known and acknowledged in the State of Maryland, and protected in the free and full exercise of its religion, by the Constitution and laws thereof, being desirous of forming a body politic and corporate as provided in said Act, have agreed to elect and have this day

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elected the following named five persons, to wit: Oliver P. Merryman, John T. Ensor, Henry L. Bowen, Daniel Shealey and Edward J. Ruter, together with the minister who may at any time be in charge of the said Towsontown Station, as trustees, in the name and on the behalf of said church, under and by virtue of said Act. And we, the said members of said charge or station do also at this first election of said body politic and corporate, determine and fix upon the following plan, agreement and regulations, viz.,

1st. This corporation shall be known as "The Trustees of Towsontown Station of the Methodist Episcopal Church," and its duration shall be forty years.

2nd. The trustees duly elected as aforesaid, to wit: Oliver P. Merryman, John T. Ensor, Henry L. Bowen, Daniel Shealey, Edw. J. Ruter, and the minister aforesaid, shall hold their office until the meeting of the fourth quarterly conference of the present year, held in accordance with the discipline of the Methodist Episcopal Church, when an election for trustees shall be held in pursuance of the regulations of said discipline, and like elections shall be held thereafter annually in accordance with the said disciplinary regulations. Provided, nevertheless, that said trustees shall be eligible for re-election.

3rd. The board of trustees elected annually according to the preceding provisions and regulations shall consist of not less than five, nor more than nine persons, a majority of whom shall be members in good standing, (for at least one year preceding such election,) of the Methodist Episcopal Church.

4th. The minister in charge of said station shall be *ex officio* president of the board of trustees. In case of the death or absence of said minister, the other trustees may appoint a chairman *pro tempore*.

5th. All the lands and tenements with their appurtenances now held for the use of said station, and all other property of said Towsontown Station Methodist Episcopal

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Church, shall be and is hereby invested in the same corporation and their successors forever; and said corporation shall be and are hereby declared to be capable of bargaining, acquiring, receiving, selling, leasing, mortgaging, encumbering or conveying or making any disposition of said property, or of any other property they may hereafter acquire as fully and effectually as any person or corporate body may or can do.

6th. The board of trustees shall meet whenever called together by the minister, or by a majority of themselves, and at all meetings of said board, three shall constitute a quorum for the transaction of business.

7th. The powers and authority hereby given to the trustees aforesaid, or to their successors, shall not in any wise be understood to prevent, prohibit or take from the ministers or preachers of the Methodist Episcopal Church, duly authorized and appointed according to the discipline of said church, the pastoral use and enjoyment of any house of worship, parsonage or other property held by said trustees.

8th. The powers and authority given to said trustees, shall not be understood to interfere with the economy of the Methodist Episcopal Church, in the arrangements made by the discipline of said church, for the support of the pastor, or the maintenance of benevolent collections.

9th. An addition or amendment may be made to these articles by two-thirds of the members of the Methodist Episcopal Church, within the bounds of said Towsontown station, who may be publicly called for that purpose, by notice given on the preceding Sabbath.

Signed by the subscribers :

JOHN W. CORNELIUS,  
JAMES SHIRADEN,  
H. W. SHEALEY,  
T. QUINN,

R. J. SMITHY,  
WILLIAM SREABY,  
GIDEON HERBERT,  
EMILY LEE.

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STATE OF MARYLAND,

*Baltimore County, to wit :*

Before me, the subscriber, a justice of the peace for Baltimore County, Maryland, personally appeared the above named persons, on this fourteenth day of October, eighteen hundred and seventy, and acknowledged this to be their act and deed.

MORDECAI ALBAM, J. P.

I, George Yellott, one of the Judges of the Circuit Court for Baltimore County. hereby certify, that the foregoing articles of incorporation and acknowledgment, have been submitted to me for examination, and I further certify that the same is in conformity with the law in such cases made and provided.

Given under my hand, this fourteenth day of October, eighteen hundred and seventy.

GEO. YELLOTT.

The signatures of the parties and the clerk, and justice and Judge of the Circuit Court of Baltimore County, being admitted, and being also admitted that Ady was clerk, and Albam a justice of the peace, and Yellott one of the Judges of the Circuit Court of Baltimore County, to which evidence the defendant objected, and the Court sustained the objection, and refused to allow the introduction of the evidence. The plaintiff excepted.

*Fourth Exception.*—The plaintiff then proposed to read in evidence, the certificate of incorporation mentioned in the plaintiff's third bill of exceptions, and to follow it up by proof of the several acts of user of the corporate franchise, mentioned in the first and second bills of exceptions of the plaintiff. And the defendant objected, and the Court sustained the objection, and refused to allow the evidence to be introduced. The plaintiff excepted.

The jury rendered a verdict for the defendant, and judgment was entered accordingly. The plaintiff appealed.

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The cause was argued before STEWART, GRASON, MILLER, ALVEY and ROBINSON, J.

*Wm. A. Fisher and Orville Horwitz, for the appellant.*

Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of the legality of its organization. *Hagerstown Turnpike Co. vs. Creeger*, 5 H. & J., 125; *Busey vs. Hooper*, 35 Md., 30.

The acts of user which the plaintiff proposed to prove, estop the defendant from denying the legality of its incorporation as against a party who has dealt and contracted with it as a corporation on the faith of such acts. *Dutchess Cotton Manf. Co. vs. Davis*, 14 Johns., 245; *Eaton vs. Aspinwall*, 19 New York, 121; *Dooly vs. Cheshire Co.*, 15 Gray, 494; *U. S. Ex. Co. vs. Bedbury*, 34 Ill., 459; *Scaggs vs. Balt. & Washington R. R. Co.*, 10 Md., 280, 281; *Callender vs. Painesville Co.*, 10 Ohio State, 516; *White vs. Coventry*, 29 Barbour, 305; *Hamtramck vs. Bank*, 2 Missouri, 169; *Williams vs. Cheney*, 3 Gray, 220; *Topping vs. Bickford*, 4 Allen, 120; *Jones vs. Cincinnati Type Co.*, 14 Ind., 89; *Brookeville T. Co. vs. McCarty*, 8 Ind., 392.

The acts of user offered to be proved by plaintiff, estopped the defendant from denying the sufficiency of their organization, or from setting up any irregularity in their certificate, as against the plaintiff. *Methodist Episcopal Church vs. Pickett*, 19 New York, 482; *Wilmington R. Co. vs. Thompson*, 7 Jones, 387; *Commonwealth vs. Bateman*, 105 Mass., 53; *Tarbell vs. Page*, 24 Ill., 46; *Leonardsville Bank vs. Willard*, 25 N. Y., 574; *Buffalo R. R. Co. vs. Cary*, 26 N. Y., 75; *Ewing vs. Robeson*, 15 Ind., 26; *U. S. Express Co. vs. Lucas*, 36 Ind., 361; *Hager vs. Cleveland*, 36 Md., 476; *New York Car Oil Co. vs. Richmond*, 6 Bosw., 213.

These cases establish as a rule of law, that persons who are not in fact regularly incorporated, or even incorporated

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at all, may so deal with others as to estop themselves, as against those others, from denying that they are incorporated.

It is not a question whether corporate franchises may be obtained in any other way than that pointed out by law, so as to enable the persons seeking to use them, to enjoy them as if granted legally, but it is whether as against one towards whom they have assumed to act as a corporation, and from whom they derived advantages by such assumption, such persons will be permitted to come into Court, and to the injury of him with whom they have so dealt, allege that they have misled and deceived him.

For the benefit of the person thus sought to be injured and defrauded, we submit that the Court will say, not that the defendants are a corporation to all intents, but that they shall not deny it, as against him to whom they have asserted it for their own advantage.

This rule of estoppel has been carried so far as to prevent the State itself from denying that a corporation has been duly organized.

In proceedings on the part of the State by information in the nature of a *quo warranto* against a corporation for the purpose of forfeiting its charter, if the information, *subpoena*, &c., are against the corporation, and the subsequent proceedings conform thereto, it is too late to question the existence of the corporation upon the ground of its non-performance of conditions precedent to its corporate existence, because the State waives the performance of these conditions, through such acts and admissions of its own officers, or is estopped from asserting their non-performance. *Commercial Bank vs. State*, 6 *Smedes & M.*, 614, 615; *People vs. Niagara Bank*, 6 *Cowen*, 196; *Bank of Auburn vs. Aikin*, 18 *Johns.*, 137; *Wood vs. Jefferson County Bank*, 9 *Cowen*, 194; *Utica Ins. Co. vs. Tillman*, 1 *Wendell*, 555; *People vs. Saratoga R. Co.*, 15 *Wendell*, 125.



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There is no such irregularity in the certificate of incorporation of the defendant in this case, as in view of the proof of user, and of its dealing with the plaintiff should invalidate it.

The certificate of the Judge is final as to the validity of the charter. *Grignon's Lessee vs. Astor*, 2 Howard, 338, 340-1-2; *Powles vs. Dilly*, 9 Gill, 241; *Anacosta Tribe vs. Murbach*, 13 Md., 91; *Balto. & Havre de Grace T. Co. vs. N. C. R. R.*, 15 Md., 193.

The rule of estoppel upon which we insist, raises none of the questions that arise in cases like that in 14 *California*, 126; 11 *Gray*, 140, and other cases of the same nature relied upon by the appellee. In those cases the suits were between creditors of corporations seeking to enforce the personal liability of stockholders, and the latter were permitted to question the validity of the incorporations. But there was no reason to apply the doctrine of estoppel to them. They were sought to be charged with a statutory liability, and among the elements of that liability, is necessarily the fact that there is a corporation. It is a necessary allegation to establish the liability, and is put in issue by the pleas. The defendants had done nothing to estop themselves from raising such an issue.

But even in such cases, the defendant may, by his own act, estop himself from setting up that defence. *Hager vs. Cleveland*, 36 Md., 476.

*Arthur W. Machen*, for the appellee.

Where a corporation is created by statute, or formed under a general statute which requires certain acts to be done before it can be considered as *in esse*, there, those acts must appear to have been done in order to establish the corporate existence. *Lord vs. Essex Building Association*, 37 Md., 325.

The fact of the incorporation was put directly in issue by the pleadings, and it was incumbent on the plaintiff to maintain the affirmative of the issue.

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The Judge's certificate, given without jurisdiction, does not affect the case. *Oler vs. Baltimore & Randallstown R. Co.*, 41 Md., 583.

In such a case there is no room for the principle of estoppel. That which does not exist cannot be estopped. There is no defendant in Court, unless there be a corporation. How can judgment go against a nonentity? If the alleged corporation has no being, it can no more be estopped, or perform those acts *in pais*, from which an estoppel may be raised, than it can contract or exercise any other function of corporate life.

Even where there is no question of the existence of the corporation, and the question simply is as to its *power* to do the act, with the consequences of which it is sought to charge it, it is clearly settled that there can be no estoppel as to an act *ultra vires*. As tersely put by Mr. McMahon, *arguendo*, "*Was there ever an estoppel against a legal disability.*" 8 G. & J., 307.

In *Pennsylvania Steam Navigation Company vs. Dandridge*, 8 G. & J., 248 it was held, that the fact that a corporation has entered into a contract does not estop it from denying its competency to do so, in an action brought against it founded upon such contract.

No corporation has any power which is not either directly conferred by its charter, or necessarily incident to some power which is conferred. Before it can be seen that it can bind itself at all, the charter must be inspected, and the power found there. Now, if the supposed corporation has no right to do *any thing*—not even to exist—it is certain it could not bind itself for the particular matter, whatever it may be, which constitutes the cause of action. *Weckler vs. First National Bank*, 42 Md., 581; *Worthington vs. Savage Man. Co.*, 1 Gill, 284; *Head vs. Providence Insurance Co.*, 2 Cranch, 127.

In *Hood vs. New York & New Haven Railroad Company*, 22 Conn., 502, the Supreme Court of Errors of

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Connecticut affirmed and followed *Pennsylvania Steam Navigation Company vs. Dandridge*.

But as we say, it does not require a *legal possibility*; and where there is none, Courts cannot consistently hold, there is an estoppel. 22 Conn., 508, 509.

There can be no estoppel for another reason, stated by Lord HATHERLEY. Every person dealing with a corporation whose instrument of organization is required by Statute to be registered, is chargeable with notice of its recorded charter. *Mahoney vs. East Holyford Mining Company*, Law Rep., 7 Ho. Lds., 893; and see *Casey's Lessee vs. Inloes*, 1 Gill, 432.

An act *ultra vires* is incapable of ratification, even by the unanimous assent of the shareholders. *Ashway Railway Carriage & Iron Co. vs. Riche*, Law Rep., 7 Ho. Lds., 653.

The cases cited by the appellant's counsel, where, after a certificate of incorporation valid under the law has been filed, and some further act *in pais* was required to be performed, the production of the certificate and evidence of user under it, have been held to raise a presumption of the performance of the condition subsequent, whether all those cases have been rightly decided or not, have no application here. In a case of that kind, there is a valid charter and an organization and existence under it, which, though liable to be avoided by the State, continue until the sovereign power does interfere. It is the case of a corporation *de facto*, though not *de jure*. The corporation had begun to exist, and was capable of continuing in being. Here, there is *no* corporation at all.

Nor do the cases where, a power being vested in a corporation, though conditions have been imposed upon its exercise, it has been held, that the corporation may, under some circumstances, estop itself to deny that those conditions have been fulfilled, have any application. The distinction is between an entire absence of power, and a power

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conferred, but only lawfully to be exercised in a certain manner. *Mercer County vs. Hacket*, 1 *Wall.*, 92.

The *dictum* in *Dutchess Co. Man. Co. vs. Davis*, 14 *Johns.*, 245, has been overruled in 7 *Wend.*, 541.

*Cochran vs. Arnold*, 58 *Penn.*, 399, another case relied on by the appellant, does not touch the present question. As stated in the opinion: "A certificate of association for corporate purposes, was made out and recorded. It set forth *all that the law required*. It was *entirely regular on its face*. A certified copy of it was filed in the office of the Secretary of the Commonwealth. *Ostensibly the requirements of the law were fully met*." 58 *Penn.*, 404: and see *U. S. Bank vs. Stearns*, 15 *Wend.*, 314.

The proposition contended for by the appellant's counsel would be as inconvenient in practice as it is illogical and unsound. If, whenever certain individuals choose to call themselves a corporation, and conduct business in the name of the supposed corporation, a corporation *de facto* is thereby created, a high attribute of sovereignty becomes unnecessary, all statutory restrictions and guards become nugatory, and any partnership may practically become a corporation.

But what kind of corporation is it, if it has no powers? No principle is better established than that all the corporate powers must be found expressed in the charter, or necessarily incident to those powers which are expressed. How would it advance the plaintiff to hold that a corporation may be considered as existing, if it is impossible that any cause of action can be established against it for want of a charter conferring power to make the contract out of which it is to arise?

There is no room for presumption or estoppel; for, the plaintiff having produced the alleged instrument of incorporation, the truth appears, and it is manifest that the provisions of the law have not been complied with, and that no incorporation was effected.

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STEWART. J., delivered the opinion of the Court.

From a careful consideration of the case, we find no error in the rulings of the Circuit Court, in the four exceptions taken by the appellant.

The controlling question to be determined under the first plea of the appellee of *nul tiel* corporation, is, whether any or all of the evidence offered on the part of the appellant in the said exception, and refused by the Court was sufficient to show, that the appellant could be held to be a corporation *de jure* or *de facto*; or to estop the appellee from disputing its liability as a corporation.

The Act of 1868, ch. 471, in its 14th sec. provides, amongst other things, for the incorporation of religious societies; and by secs. 151, 162, 163 and 164, for religious corporations.

These last provisions are more especially applicable to the organization of a church religious society, or congregation of whatever denomination which the appellee professes to be, and it is to be presumed were intended for such purpose

Amongst other requisites to constitute a religious corporation, church, religious society or corporation under these last sections, it was necessary that the agreement for that purpose should be acknowledged by the trustees or a majority of them, before two justices of the peace of the county or city in which the church, congregation or society, or the greatest number of the members shall reside, or before a Judge of the Circuit Court, or of the Supreme Bench of Baltimore, and certified by the said justices or Judge according to the directions of sec. 163.

No authority having been given to the Judge by these provisions, to determine that the law had been complied with, his certificate is not sufficient evidence that the defendant is a corporation.

But the appellant has undertaken to offer evidence of certain acts and proceedings of the appellee, referred to in

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the exceptions, to show that it held itself out as a corporation, and treated with the appellant as such, and is estopped from denying its liability as a corporation.

We think it would be extending the doctrine of *estoppel* to an extent, not justified by the principles of public policy, to allow it to operate through the conduct of the parties concerned, to create substantially a *de facto* corporation, with just such powers as the parties may by their acts give to it.

This would be substituting the dealings of the parties, for compliance with the requirements of the law, and giving to them the same effect through the aid of the Courts. Thus, virtually, through the Courts, recognizing the existence of the corporation, in manifest disregard of the written law.

It has been determined by this Court, that a corporation cannot bind itself in excess of its powers. *Penna. Steam Navigation Co. vs. Dandridge*, 8 G. & J., 319.

Whilst denying its capacity upon any principle of *estoppel*, to make contracts *ultra vires*, to bind itself; it would not be consistent with that theory to recognize its *existence ad libitum*, according to the conduct of the parties concerned.

Such a principle would seem to affix no other limit to the existence of the corporation *de facto*, or the extent of its power than the dealings of the parties, through the recognition of the Courts, might, upon the doctrine of *estoppel*, prescribe.

It would be more reasonable to hold corporations to their contracts, though *ultra vires*, of which they have received the benefit, or to prevent parties who have contracted with them, and received the benefit therefrom, from defeating their liability, on the ground of want of power in the corporation, as is held in quarters of high authority, (see note and references in *2nd Kent*, 351,) than to hold that corporations should be deemed to have existence, because they had so held themselves out.

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The statute law of the State, expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, and clearly against its policy, and justified upon no sound principle in the administration of justice.

*Judgment affirmed.*

(Decided 8th March, 1877.)

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HORACE E. ROBERTS, and others, Executors of HENRY T. ROBERTS vs. THE WOVEN WIRE MATTRESS CO. OF HARTFORD, CONNECTICUT.

*Evidence—Letters admissible to prove notice of the facts stated therein—Letters and judgment record admitted as part of the res gestæ—Guaranty: notice to guarantor of default of principal; consideration—What facts will evidence the acceptance of a contract, or its abandonment.*

A letter which is *per se*, and without further proof, inadmissible in evidence, may become admissible, when it is followed up by further proof, as purporting to give notice of the fact stated therein, and its admission will not be ground for reversal, particularly when no injury was done to the appellant thereby.

In an action against a surety, the record of a judgment against his principal, unless shown to be on account of matters connected with his guaranty, is inadmissible. But where the record shows a liability embraced by the guaranty of the surety, it is *prima facie* evidence for that purpose.

On the 26th of April, 1870, R. wrote a letter to the M. Co. stating his intention to take the agency of the Co., and that his brother would be offered as surety for the performance of his obligations. On the 12th of May, 1870, a contract of agency between R. and the Co. was perfected, and on the 21st

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of May, 1870, a bond of indemnity was executed by his brother as guarantor. In a suit by the Co. against the guarantor on the bond, it was **HELD** :

That as a preliminary step towards a final arrangement, if made out to the satisfaction of the jury, between R., the Co., and the guarantor, the letter was a constituent part of the transaction, and was admissible in evidence.

Where letters were read to the jury by one party to a cause without objection or statement of the purpose; after the limitation of their effect upon the objection of the other party, it is not the province of the Court, *sua sponte*, to undertake to define any other purpose for which they might be used.

Where a party has given a bond to another to secure the faithful performance of the contract of a third person, it is the duty of the obligee to give reasonable notice to the guarantor of any defalcation on the part of the contractor. It is the prerogative of the Court to define the character of the notice, and the duty of the jury to determine whether such reasonable notice has been given.

Where a guaranty is subsequent to the contract between the principal and the guarantee, and forms no part of the consideration thereof, it requires a distinct consideration to give it efficacy as a collateral undertaking.

But where a guaranty expressly referred to a previous agreement between the principal and the guarantee, which was executory in its character, and embraced prospective dealings between the parties; then the guaranty purports upon its face and by necessary construction a sufficient consideration.

Where a contract of guaranty was signed by the guarantor, and delivered to the agent of the guarantee, and was in the possession of the guarantee at the time of a suit upon the contract, and was produced by him; there is sufficient *prima facie* evidence of the delivery and acceptance of the contract of guaranty, and other notice of its acceptance is unnecessary, unless there had been a stipulation to that effect.

Where a guarantor warranted the faithful performance by his principal of certain duties stipulated in a contract, among which was the duty of making returns of sales; the failure by the guarantee to notify the guarantor of his principal's default, and permitting the principal to make returns in a manner different from the stipulated mode, cannot afford sufficient evidence of the abandonment of the contract and the substitution of another.

Case where it was held that there was no evidence of the violation of a contract by one party thereto, sufficient to preclude him from recovering against the guarantor of the other party.



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APPEAL from the Superior Court of Baltimore City.

This was an action brought by the appellee against the appellants as executors of Henry T. Roberts, deceased. The cause of action was a bond given by their testator to the plaintiff, dated May 21st, 1870, the condition of which was in these words :

"Whereas, M. Roberts has entered into an agreement with the said company, to act as their agent for the State aforesaid, to transact the sales of the company to the best of his ability, and to make returns for such sales to the company, for sales of previous months on the 15th of each month ; then if this agreement is well and fully fulfilled by said M. Roberts, this bond shall be null and void, otherwise in full force."

Mathias Roberts above named, became the general agent of the appellee for the State of Maryland, with the exclusive right of sale therein, by a written authority, dated May 12th, 1870 ; this paper refers to another containing the terms, periods of payment, &c., which was also dated May 12th, 1870.

Verdict and judgment being for the plaintiff, the defendants took this appeal.

*First Exception.*—After offering in evidence the bond and contracts above mentioned, the plaintiff then offered Stovie, a competent witness, who testified that he resided at Hartford, Connecticut, that he is the book-keeper of the plaintiff and was at the time of the transaction in controversy in this case. The plaintiff then, under an agreement that copies of letters should be taken as originals, offered in evidence the following copy of a letter dated October 7th, 1—, and addressed to Henry T. Roberts, the signature thereto being admitted to be genuine.

*Dear Sir.*—I have just been advised by your brother, that you have returned to Baltimore, and take this early opportunity to write you in regard to the matters of business between us

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When your brother, M. Roberts, started the agency in Baltimore, he furnished us your bond for \$1000. It became evident in the summer that he would not be able to meet his obligations to us, but as you were absent from town, we were then unable to notify you of this fact. You have doubtless been aware of the circumstances however; and we shall be pleased to have a speedy settlement of the account, which has already run too long. I am waiting for him to furnish us with his figures. The amount due is about seven hundred dollars.

Yours, respectfully,

GEO. C. PERKINS, *Secretary.*

The defendants objected to the admissibility of said letter, but the Court, (DOBBIN, J.,) allowed the same to be read to the jury. The defendants excepted.

*Second Exception.*—The witness, Stovie, then further testified, that the said letter was written by Mr. Perkins, October 7th, 1871; that the copy produced in evidence, was the copy taken, at the time it was written, in the regular letter book of the plaintiff; and was brought by witness from the office of plaintiff with him; that the date was imperfectly copied, as part of it was in print, and consequently the whole date of 1871, would not appear in the letter-press copy; that the witness recollected mailing said letter, and walked with Mr. Perkins to the post office; that he was able to recall this letter especially, because he directed it, and talked over it at the time, and was familiar with the fact of the trouble growing out of the defalcation of their agent, M. Roberts.

The plaintiff then offered in evidence, the record of a judgment obtained by plaintiff against Mathias Roberts, December 5th, 1872, in the Superior Court.

To the admissibility of this record under the pleadings and issues in this case, the defendants objected, but the Court allowed the same to be read to the jury, as *prima*

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*facie* evidence of the liability of the defendants, and for such purpose only. The defendants excepted.

*Third Exception.*—The plaintiff then offered in evidence a letter, the signature of which was admitted to be that of Mathias Roberts, addressed to the plaintiff, dated April 26th, 1870.

Mr. Geo. C. Perkins.

Dear Sir:—I am yet unsettled in my business arrangements, and am seeking a suitable warehouse for the mattresses. I shall take the agency for Maryland, and will offer my brother as guarantee, that no loss shall accrue to your company in our transactions, his name is H. T. Roberts, No. 6 Saint Paul street, to whose number you can address the contract.

Very truly, &c.,

M. ROBERTS.

To the admissibility of this letter the defendants excepted, but the same was allowed to be read to the jury in connection with all the evidence in the case, as tending to show that the appointment of M. Roberts, as agent of the plaintiff, and the suretyship of the defendants, were parts of one and the same original transaction. The defendants excepted.

*Fourth Exception.*—The defendants to sustain the issue on their part, offered certain testimony of Mathias Roberts: they also offered certain letters which had passed between him and the secretary of the plaintiff, in regard to the sale by plaintiff of two mattresses within the territory where, by his contract, he had the exclusive right of sale; the plaintiff however offering to allow him the commissions on the sale of said mattresses.

Upon cross-examination the witness Roberts, was asked if he did not receive from plaintiff letters demanding returns, and was offered the following letters, the signatures of which were admitted.

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BALTIMORE, Sept. 29, 1871.

Dear Sir :—Your letter of the 21st is received and contents noted. My brother's return is expected on the 1st of October, and I shall endeavor to have matters between us closed as speedily as possible ; it has been suggested by the largest manufacturer in the State that I transfer to him my right of agency for a compensation in the shape of per cent. on sales, he ordering the mattresses on 30 days, and he assuming the payment of all bills ; he is undoubtedly responsible ; if you will consent to such an arrangement, you will receive an order immediately for beds amounting to \$300, as I am now holding orders that will cover half that amount.

I am behind in running the bed thus far, but still believe the future will pay to run it as a specialty, but I am not able. Hoping this arrangement will suit,

I remain, respy.,

M. ROBERTS.

BALTO., Octo. 20, 1871.

Mr. Geo. C. Perkins,

Dear Sir :—Not being much here, I found this morning from you three letters of different dates, urging that I make a statement of my acct., and offer again to Mr. Hanson the remaining beds on hand ; as I have always abided by your statements heretofore, I see no reason why I should now digress from that rule, and as I said before Mr. Hanson declines to make an offer for the mattresses on hand. I trust you will consider this an answer to your communications on the subject ; with regard to an answer from my brother to your letter, I have no control in the matter ; the woven wire mattress, I assure you, has *busted* me—I am dead broke, and I'm running about for insurance again.

Respy.

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The witness admitted he had received the letters referred to, but the defendants excepted to the admissibility of the above letters as competent to prove that the said Henry T. Roberts was cognizant of the facts stated in the same; which objection was sustained by the Court, but the same were allowed to be read to the jury for other purposes. The defendants excepted.

*Fifth Exception.*—This was to the ruling of the Court on the prayers of the respective parties, which were as follows :

The plaintiff offered the following prayer :

If the jury find that the contract between the witness, M. Roberts, and the plaintiff, and the guaranty given by the defendant to the plaintiff, were made and given in pursuance of one and the same understanding, although in fact written and signed on the days of their respective dates ; and shall further find that the said M. Roberts made default under the terms of said agreement between him and the plaintiff, by which default the plaintiff was damaged ; and shall further find that the defendant had reasonable notice given him by the plaintiff of such default, and that neither the said M. Roberts nor the defendant has made good the wrong and injury consequent on said default of said M. Roberts, then the plaintiff is entitled to recover.

And the defendants offered the eight following prayers.

1. If the jury find from the evidence, that the witness, M. Roberts, and the plaintiff made the contract of agency for the sale of plaintiff's goods, dated May 12, 1870, and that the said M. Roberts then became the agent of the said plaintiff, and that the paper purporting to be a guaranty, dated May 21, 1870, and signed by Henry T. Roberts, defendant, was made and executed at the date thereof, and consequently subsequent to the aforesaid contract of agency, then such guaranty must contain a new and distinct consideration to render the same valid and obligatory between the plaintiff and defendant, and the said

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paper dated May 21, 1870, does not contain such consideration, and the plaintiff is not entitled to recover.

2. If the jury find from the evidence that the plaintiff and M. Roberts made the contract of agency, dated May 12, 1870, for the sale of plaintiff's goods, and that said Roberts then became such agent, and that the paper purporting to be a guaranty, dated May 21, 1870, and signed by Henry T. Roberts, was made and executed at the date thereof, and consequently subsequent to said original contract of agency, and that the sum of \$1000 mentioned in the said paper—nor any other sum of money was paid by plaintiff to the defendant as the consideration thereof, at that time or any other time, then the said contract is inoperative in law and the plaintiff is not entitled to recover.

3. If the jury find from all the evidence in the case that the defendant Roberts signed and delivered to M. Roberts, the agent of the plaintiff, the guaranty offered in evidence, dated May 21, 1870, that then the said guaranty could not operate as a valid obligation or contract between the plaintiff and the defendant Roberts, until the same had been accepted by the plaintiff, and until the plaintiff had duly notified the defendant, Henry T. Roberts, that said guaranty was accepted, and there is in this case no such evidence of such notice of acceptance, and the plaintiff is not entitled to recover.

4. If the jury find from the evidence that the witness, Mathias Roberts, and the plaintiff, made the contract of agency for the sale of plaintiff's wares in Maryland, bearing date May 12, 1870, and that at that time the said agent owned or possessed as stated by him, the sum of \$1000, and that the defendant made and delivered the contract of guaranty, dated May 21, 1870; and if the jury find that the said witness, M. Roberts, made default in not returning sales as required in his contract shortly after executing the same, then it became the duty of the

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plaintiff to notify the defendant of such default within a reasonable time after said default ; and if the jury find that the plaintiff allowed said default to continue and be repeated for a long time thereafter without notice to the defendant thereof, and that the said M. Roberts became insolvent in the meantime and before such notice was given to the defendant, then the jury may infer that the defendant has been damnified by the negligence of the plaintiff, and he is not entitled to recover.

5. If the jury find from the evidence that the witness, M. Roberts, and the plaintiff made the contract of agency offered in evidence, dated May 12, 1870, then it became the duty of said M. Roberts to make returns of sales at the time stated in the said agreement ; and if the jury find that the said M. Roberts never did make returns of sales at the times required ; and that the plaintiff did not, when such default occurred, or within a reasonable time thereafter, notify the defendant of such default, but suffered and permitted the said agent to make returns at other times or in a manner different from the terms of the contract, then there is evidence from which the jury may infer that the plaintiff and said agent had abandoned the said terms or had made others and different ones ; and if the jury so find, then the plaintiff is not entitled to recover.

6. If the jury find from the evidence, that the witness, M. Roberts, became the agent of the plaintiff on the 12th day of May, 1870, under the agreement of that date offered in evidence, then it became the duty of said agent to make returns of sales at time and manner stated in said agreement ; and if the jury further find that the defendant executed the contract or guaranty, dated May 21st, 1870, conditioned for the faithful execution of said contract or agency as stated therein, and if the jury further find from the evidence, that the said M. Roberts made default, and did not comply with the terms of his contract, and

made default in not returning sales of the plaintiff's goods, as required in said agreement, then it became the duty of the plaintiff to notify the defendant of such default within a reasonable time after the same occurred ; and if they find that the letter offered in evidence by the plaintiff, dated October —, 1871, (if they find that the said letter was in fact written and mailed at that time) was the first notice imparted to the defendant of the default of said M. Roberts, and that at that time the said M. Roberts, had become insolvent and irresponsible, that then plaintiff is not entitled to recover.

7. If the jury find from all the evidence, that the guaranty offered in evidence by the plaintiff, signed by Henry T. Roberts, was executed and delivered subsequent to the appointment of the witness, M. Roberts, as agent of the plaintiff, under the agreement dated May 12th, 1870, that then the said guaranty is inoperative and void, unless a new and separate consideration passed from the plaintiff to the defendant at the execution thereof, and stated as set forth in said guaranty, and the said guaranty offered in evidence in this case does not contain such consideration, and the plaintiff is not entitled to recover.

8. If the jury find that the plaintiff and the witness M. Roberts, made the agreement of agency for the sale of plaintiff's wares in Maryland, dated May 12, 1870, then the said M. Roberts was entitled as stated in said agreement, to the exclusive sale of plaintiff's goods in and for the State of Maryland ; and if the jury find that the plaintiff sold goods in this State, to parties in this State, that then the plaintiff acted in contravention to said agreements, and varied the terms and conditions of the same in a material matter, and it cannot recover against the defendant as guarantor of the said agreement, under the contract offered in evidence, dated May 21st, 1870.

The Court granted the plaintiff's prayer, and rejected the first, second, third, fifth, seventh and eighth prayers



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of the defendants, and granted their fourth and sixth. The defendants excepted.

The cause was argued before BARTOL, C. J., STEWART, BOWIE, GRASON, MILLER and ALVEY, J.

*John C. King*, for the appellants.

*S. S. Pleasants* and *Fielder C. Slingluff*, for the appellee.

STEWART, J., delivered the opinion of the Court.

The admission of the letter agreed to have been signed by Perkins, secretary of the appellee, bearing date October 7th, 1871, addressed to Henry T. Roberts, was the ground of appellants' first exception.

This letter *per se*, and without further proof or statement that it was to be followed up, was inadmissible; but when in the further progress of the case, it was proved by Stovie, the witness, that the letter was mailed, it was admissible, as purporting to give notice to the appellant of his brother's defalcation.

Its admission under the circumstances, affords no valid ground for the reversal of the judgment, as no injury was done to the appellant. See *Wyeth vs. Walz*, 43 Md., 426.

There was no error in the second exception admitting the record of the judgment of the appellee against M. Roberts.

The appellant, the surety, being no party to the judgment, that, of course, furnished no evidence against him *per se*; and unless shown to be on account of matters connected with his guaranty, was not admissible. The act or admissions of his principal could not bind him as the surety without such connection.

But the record of the judgment, including the declaration and account of the appellee, upon which the judgment was rendered, having been admitted by the agree-

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ment of the counsel filed since the argument of the case, that shows a liability embraced by the guaranty of the appellant. The record was admissible as *prima facie* evidence for that purpose. *Iglehart vs. State*, 2 G. & J., 235.

The admissibility of the letter, the signature to which is conceded to be that of M. Roberts, addressed to the appellee, bearing date April 26th, 1870, and produced by the appellees, is the ground of the third exception.

The letter referred to events to occur in the future, stating the intention of M. Roberts to take the agency of the appellee for the State of Maryland, and that his brother would be offered as surety for the performance of his obligations. As a preliminary step towards a final arrangement, if made out to the satisfaction of the jury from all of the testimony, between his brother and himself and the appellee, it was a constituent part of the *res gestæ* of the transaction, and there could be no reasonable objection to its admission, and the Superior Court committed no error in so ruling.

We discover no principle of the law of evidence that will admit the letters offered in proof, in the fourth exception, by the appellee, as competent to prove that H. T. Roberts was cognizant of the matters stated therein. The letters having been read to the jury by the appellee, without objection or statement of the purpose, after the limitation of their effect upon the objection of the appellant, it was not the province of the Court *sua sponte*, to undertake to define any other purpose for which they might be used. Whether they had any other pertinency to the case could be determined by the jury, if the appellant did not think proper to ask to have them withdrawn.

The point is rather immaterial. The rulings in this exception must be affirmed.

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The granting of the appellee's prayer, and the refusal of the appellants' first, second, third, fifth, seventh and eighth prayers, constitute the fifth exception.

There is no doubt it was the duty of the appellee to give reasonable notice to the appellant, of any defalcation on the part of M. Roberts, whose faithful conduct he had guaranteed.

After the Court had instructed the jury, that such notice was necessary, it was their province to determine whether such reasonable notice was given. It was the prerogative of the Court to define the character of the notice, and the duty of the jury to determine from all the facts if the notice had been given, and such as was reasonable under all the circumstances.

Especially after the appellant had the benefit of his fourth and sixth prayers, we do not see upon what principle he has any valid ground of complaint.

The appellee's prayer was properly granted.

The first, second and seventh prayers of the appellant involving modifications of the same question were properly refused. There is no doubt of the law, that if the guaranty was subsequent to the contract between M. Roberts and the appellee, and formed no part of the consideration thereof, it required a distinct consideration to give it efficacy as a collateral undertaking; but the terms of the guaranty expressly refer to the agreement made with the appellee by M. Roberts, to act as their agent to transact the sales of the company to the best of his ability, and to make returns for such sales to the company for the previous month on the 15th of each month; showing the agreement to have been executory in its character, embracing prospective dealings between M. Roberts and the appellee; purporting upon its face and by necessary construction a sufficient consideration, and is clearly within the principle decided in the case of *Hutton vs. Padgett*, 26 Md., 228, and reiterated in the recent case of *Deutsch & Co. vs. Bond*, ante 164.

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The appellants' third prayer was properly refused.

If the guaranty offered in evidence referred to in this prayer, was signed and delivered to M. Roberts the agent of the appellee, and was in his possession and produced by him, that was sufficient *prima facie* evidence in the absence of any proof to the contrary, of the delivery and acceptance of the contract of guaranty; and other notice of its acceptance was unnecessary unless there had been a stipulation to that effect. *Union Bank of Maryland vs. Ridgely*, 1 H. & G., 324.

The appellant had substantially the benefit of his fifth prayer in the granting of his fourth and sixth prayers, so far as any failure to give notice to the appellant, of any default of M. Roberts was concerned.

The failure to give appellant notice of M. Roberts' default, and permitting the agent, M. Roberts, to make returns in a manner different from the terms of the contract, could not afford sufficient evidence of the abandonment of the contract and the substitution of another, and such conclusion should not have been submitted to the jury. The prayer was properly refused.

The appellants' eighth prayer was properly refused. There was no sufficient evidence of such violation of the contract on the part of the appellee, as totally to preclude the appellee from recovery thereunder.

*Judgment affirmed.*

(Decided 8th March, 1877.)

GERSON ROSENSTOCK and MEYER STEIN vs. WILLIAM  
ORTWINE.

*Effect of a Conceded prayer—Advance Mortgage—Assignment of Contract—Extension of time—Distinction drawn between qualifying and conflicting prayers—Liability of assignee of a contract for Collateral Obligations of the assignor.*

On the 8th of August, 1872, R. and S. made a lease to C. of land in Baltimore County, for the term of 99 years renewable forever. On the same day C. mortgaged the leasehold interest to the lessors to secure the repayment to them of a sum of money, agreed to be advanced to him by them, in specified instalments, upon certain dwelling houses which C. agreed to erect upon said lots. By the terms of the loan the money so to be advanced, was to be "*expended in the purchase of materials for and defraying the expenses of erecting said houses, and for no other purpose.*" Among other covenants in the mortgage C. covenanted, "to begin work forthwith and to complete the said houses, together with all necessary out-buildings, fencing and grading of the yards, and to have said houses ready for occupation of tenants in six months from the date hereof," &c. On the 10th September, 1872, C. delivered to O. the following order: "Messrs. R. and S. Will please pay to the order of O. six thousand dollars, in payment for bricks to be furnished by him in erecting the houses to be built on the lots of ground heretofore leased by the said R. and S. to C., out of the last payments that shall be due the said C. by the said R. and S., in accordance with the terms of the mortgage from C. to R. and S. upon said lots of ground. Signed, C. Baltimore City, September 10th, 1872." R. and S. wrote their acceptance upon this order on the day of its date, and four several payments by them were credited by endorsements thereon. The bricks were delivered as agreed upon by O., and C. commenced the buildings, but stopped work before they were entirely completed. In an action brought by O. against R. and S. to recover the balance due him upon said acceptance, O. testified that about the month of June, 1873, after C. had stopped work, one of the defendants said to him, "O. why don't you go to work and get those houses finished, I want to get the matter settled." Whereupon he went on to finish the houses, and did all that was required by the contract, as he

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thought was intended. The defendants' first prayer which was conceded, affirmed that the order and the acceptance thereof by the defendants were conditional only, and the right of the plaintiff to recover depended precisely upon the same conditions, which the mortgage required to be performed by C. himself before he would become entitled to the money in question. **Held:**

- 1st. That this concession rendered the construction of the contract between the mortgagor and mortgagees a necessary preliminary to the decision of the case, if not the vital question.
- 2nd. That whether right or wrong the parties had agreed that this was the law of the case, which agreement *pro hac vice*, was alike binding on them and the Courts.
- 3rd. That the order and acceptance of it constituted an assignment by consent of mortgagor and mortgagees, or drawer and drawees, of so much of the fund on which it was drawn to be paid on the performance of the conditions referred to—the terms relating to that subject; which were as to the mode and time of erecting the buildings.
- 4th. That the extension of the time by the defendants as given in evidence by the plaintiff, substituted the latter in the place of C., and entitled him to the benefit of the contract, as if the terms of the contract as to time originally had been complied with.
- 5th. That the fund dedicated by the contract for the erection of the buildings, could not, in the hands of an assignee for valuable consideration, be encumbered with the collateral obligations of the assignor.
- 5th. That the plaintiff's obligation under the accepted order, required only the completion of the buildings "in accordance with the terms of the mortgage," by which the whole sum of money to be advanced, was to be expended in the purchase of materials for and defraying the expenses of erecting said houses, and for no other purpose.
- 6th. That the time for completing the work being waived, and the other prerequisites complied with, the plaintiff became entitled to his money without deduction or abatement for ground rent, interest, drainage, or other liabilities of his assignor for breach of other covenants in the mortgage.

**APPEAL** from the Superior Court of Baltimore City.

This was an action brought by the appellee to recover from the appellants money claimed to be due him under their acceptance, or an order drawn upon them in his favor.

The case is stated in the opinion of the Court.

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*First Exception.*—At the trial the plaintiff offered the two following prayers :

1. If the jury shall find from the evidence, that the order mentioned in the evidence as given by D. W. Caskey on the defendants, and accepted by them on 10th of September, 1872, was so given and accepted, and that the plaintiff furnished the bricks referred to in said order to Caskey, and that afterwards payments were made on said order by defendants, in the amount and at the times shown by the receipts on the back of said order, and shall further find that the houses mentioned in the evidence were built and finished in accordance with the plans and drawings agreed upon between said Caskey and the defendants, and shall further find that the said Caskey commenced the building of said houses, but stopped work on the same before they were entirely completed, and that afterwards Meyer Stein, one of the defendants, said to the plaintiff:—"Ortwine, why don't you go to work and get the houses finished: I want to get the matter settled;" and that thereupon the plaintiff proceeded to finish and did finish the said houses in a reasonable time thereafter, then the plaintiff is entitled to recover the sum of \$4000, with interest, in the discretion of the jury, from the time of the said completion.

2. That the grading of the yards required to be done under the covenant contained in the said mortgage, was only the grading necessary at the time of the execution of the said contract, and not such grading as might be rendered necessary by subsequent improvement in the neighborhood; and therefore that all evidence offered by the defendants in regard to the effect on the present grading of the lots in question by the future improvement of the adjoining property, or the future changes of the grades of streets, lanes or alleys, is inadmissible under the contract in this case, and must not be considered by the jury in making up their verdict.

And the defendants offered the seven following prayers:

1. That the order of Caskey and acceptance thereof by the defendants, which has been given in evidence by the plaintiff, are conditional only, and the right of the plaintiff to demand the money mentioned in the order, or any part thereof, is made by the terms of the order to depend upon precisely the same conditions which the mortgage required to be performed by Caskey himself, before he would become entitled to the advance of the money now in question.

2. That by the terms of the mortgage the defendants were lenders of money, to be advanced only upon certain terms and at certain times in the mortgage set forth, and that Caskey himself had no right to demand, nor did he by his order as accepted entitle Ortwine to claim, the last advance for which the mortgage stipulated, unless the buildings mentioned in the mortgage should be finished in accordance with the plans and drawings therein referred to, and all the necessary out-buildings, fencing and grading of the yards completed, and the premises ready for occupation of tenants in six months from the date of the mortgage.

3. Although the jury may find that the time for the completion of the buildings and premises, as prescribed by the mortgage, was enlarged by the defendants, or that Caskey or Ortwine went on with the work upon the same after the time fixed in the mortgage, by the consent of the defendants, the plaintiff is not entitled to recover, unless the jury shall find that the said buildings were completed, with all the necessary out-buildings and fences, and the necessary grading of the yards, before the sale of the premises under the mortgage.

4. Even if the jury shall find that the time for the completion of the buildings and premises, in the manner set forth in the mortgage, was extended by the defendants, or that Caskey or Ortwine went on with the work upon



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said buildings and premises after said period, with the consent of the defendants, and that said buildings were in fact afterwards completed, and the yards graded by Caskey or Ortwine, as required by the mortgage, the defendants are nevertheless entitled to a credit upon the order in controversy, for all ground rent, interest and taxes in arrear and due to the defendants by Caskey, under the mortgage, at the time of such completion.

5. That by a proper construction of the terms of the mortgage, in view of the circumstances and situation of the property, as given in evidence, the character of the grading spoken of in the mortgage as "necessary," was to be determined not by the condition and necessities of the lots alone as they then stood, but by the relation of said lots to the surrounding property and streets, and the grading and improvement of the latter, which were reasonable and proper to be anticipated at the time when the mortgage was executed.

6. If the jury shall find that the drainage of the property in question as the yards thereof were graded and left by Caskey and the plaintiff, requires and involves the necessary flow and discharge of the surface water from the said property over an adjoining lot belonging to other parties, whence it had no escape except through a private sewer upon said lot, and thence upon another lot also belonging to private parties, then said grading was not the grading required by the mortgage, and the plaintiff cannot recover.

7. If the jury shall find that any amount whatever was required to be expended by the defendants for the completion of the premises and grading prescribed and required by the mortgage, after the said premises had been jointly abandoned as completed by Caskey and the plaintiff, the jury are bound to give the defendant credit for such amount, and also for the arrears of interest and ground rent, if any, which they shall find to have been due by Caskey under the

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mortgage at the time when the premises were so abandoned; and if the said amounts shall exceed what, (if anything,) the jury under the instruction of the Court may find the plaintiff otherwise entitled to recover, the verdict must be for the defendants.

The Court (DOBBIN, J.,) granted the plaintiff's two prayers and the first three prayers of the defendants, (the first of which was also conceded by the plaintiff,) and refused the defendants' fourth, fifth, sixth, and seventh prayers. The defendants excepted.

The jury rendered a verdict in favor of the plaintiff, and judgment was entered accordingly. The defendants appealed.

The cause was argued before BARTOL, C. J., STEWART, BOWIE, BRENT, GRASON, MILLER and ALVEY, J.

*J. I. Cohen and S. T. Wallis*, for the appellants.

*Robert D. Morrison and Orville Horwitz*, for the appellee.

BOWIE, J., delivered the opinion of the Court.

The defendants' first prayer, which was conceded, affirms that the order and acceptance thereof by the defendants, on which the action is brought, are conditional only, and the right of the plaintiff to recover depends precisely upon the same conditions which the mortgage required to be performed by Caskey himself, before he would become entitled to the advance of the money now in question. This concession renders the construction of the contract, between the mortgagor and mortgagees, a necessary preliminary to the decision of the case, if not the vital question.

Whether right or wrong, the parties have agreed that this is the law of the case, which agreement "*pro hac vice*"

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is alike binding on them and the Courts. *Baughers vs. Wilkins*, 16 Md., 35, 46; *Phila., Wil. & Balt. R. R. Co. vs. Barker*, 29 Md., 339.

The contract between the mortgagor and mortgagee, consists in the lease and the mortgage, which were executed simultaneously, the latter referring to the former expressly.

These instruments show that the appellants, leased to David W. Caskey, on the sixth of August 1872, in consideration of the payment of rents thereby reserved, sixteen vacant lots, laying on the North side of North Avenue in Baltimore County, near the limits of the City of Baltimore, for ninety-nine years renewable, the said Caskey paying on each of said lots, accounting from the first of January, 1873, semi-annually, certain ground rents, amounting in the aggregate per annum to \$1673.50, but each particular lot to be liable only for its own rent or portion of the aggregate sum. Caskey covenanted to pay the rent semi-annually, and all taxes and assessments levied on said lots or rents.

The mortgage from Caskey to Rosenstock & Stein, of the same date, recited the execution of the lease, and whereas the said Caskey is about to erect and build upon said lots, sixteen good and substantial dwelling houses, and whereas the said Rosenstock & Stein, at the request and for the accommodation of said Caskey, have agreed to loan and advance to him the sum of thirty-two thousand dollars, *to be paid him during the progress of the building of said houses in the following manner, that is to say:* \$250 on each house to be erected when the first floor of joist is reached and put down: (and so on each floor being laid to the fourth inclusive:) \$250 on each house, when under roof: \$250 on each when ready for plastering; \$250 on each when plastered, and two hundred and fifty dollars when finished; *the whole of which sum of money shall be expended in the purchase of materials for and defraying*

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*the expenses of erecting said houses, and for no other purpose.* Said houses to be erected in accordance with the plans and drawings approved by said Rosenstock & Stein, etc. It was understood and agreed by the parties thereto, that the interest shall be computed and paid on said sum of money to be advanced from the time of the advancements, and the whole \$32,000, with interest thereon semi-annually from the first of January, 1873, (interest to that date to be adjusted,) is to be repaid to said Rosenstock & Stein on or before the 1st of July, 1874; and also, that said sum or such portion when advanced shall enure as a lien on all sixteen lots of ground, and the improvements thereon erected, etc., and it was a condition precedent to making said loan, that the repayment thereof with interest, as therein provided, and the performance of the conditions therein contained, and the agreements therein set forth, should be secured by a good and sufficient mortgage, wherefore those presents were executed. Caskey entered into the usual covenants to pay ground rent, interest and taxes.

In case of default being made in any of the conditions of the mortgage, the mortgagees were authorized to sell, etc.

And the said Caskey further covenanted "to begin work forthwith, and to complete the said houses, together with all necessary out-buildings, fencing and grading of the yards, and to have said houses ready for occupation of tenants in six months from the date hereof," etc.

D. W. Caskey, the mortgagor, on the 10th September, 1872, delivered to the appellee Ortwine, the following order or draft:

"*Messrs. Gerson Rosenstock and Meyer Stein;*

"Will please pay to the order of William Ortwine six thousand dollars, in payment for bricks to be furnished by

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him in erecting the houses to be built on the lots of ground heretofore leased by the said Rosenstock & Stein to David W. Caskey, out of the last payments that shall be due the said David W. Caskey by the said Rosenstock & Stein, in accordance with the terms of the mortgage from David W. Caskey to Rosenstock & Stein, upon said lots of ground.

Signed. D. W. Caskey."

"Baltimore City, Sept. 10th, 1872."

This draft was accepted on the day of its date. Four several payments of \$500 each, dated September 14th, 1872: February 11th, 1873: April 2nd, 1873; and April 25th, 1873; by Messrs. Rosenstock & Stein, were credited by endorsement.

The bricks were delivered as agreed upon by Ortwine; Caskey commenced the buildings, but stopped work before they were entirely completed. It is in evidence in the cause, that afterwards, about the month of June, 1873, Meyer Stein, one of the defendants, said to the appellee "Ortwine, why don't you go to work and get those houses finished, I want to get the matter settled," whereupon the witness testified, he went on to finish the houses, and did all that was required by the contract, as he thinks was intended.

The action is brought by the appellee, upon the theory, that the limitation of time for the completion of the buildings, prescribed by the mortgage, having been waived by the mortgagees, and the work done or completed by the appellee, agreeably to the provisions of the mortgage in other respects, he is entitled to recover the amount of the order, less the credits endorsed, without further abatement or deduction. That according to the true interpretation of the agreement between the parties, as evidenced by the premises of the mortgage, the whole of the sum of money (thereby agreed to be advanced,) was to be expended in

the purchase of materials for, and defraying the expenses of erecting said houses, and for no other purpose whatsoever.

That the order of the defendants in favor of the appellee, is an assignment of a part of the fund appropriated to the erection of the buildings, not subject to any other conditions or covenants between the mortgagor and mortgagee.

The prayers submitted by the appellee, and granted by the Court, affirm these propositions. The appellants on the other hand, by the instructions offered by them, maintain that the appellee is subject to all the covenants of the mortgagor, is to fence and grade the yards; to pay the the ground rent, interest and taxes; to drain the premises, etc., and that the sums necessary for these purposes should be recouped or set off against the claim of the appellee.

The lease and mortgage taken together, show that as between the appellees and Caskey, the mortgage was not a mere security for money to be advanced on real estate, having a certain value sufficient to make the loan secure, but it was a device or arrangement between the owners of unimproved and unproductive lots on the one hand, and a contractor or builder on the other, by which the owners proposed to improve and enhance their lots, converting them into leasehold tenements, yielding rents, free from all encumbrances, and the contractor, by means of the skill, labor and materials expended in the improvements, expected to realize handsome profits, by either selling or subletting the premises. The lessors, determined to secure the priority of lien, as a condition precedent, stipulated that the repayment of the money should be secured by a good and sufficient mortgage.

How, under these circumstances, were the objects of the contracting parties to be carried out, without establishing by the contract between them, a fund, payable by instalments, to be exclusively appropriated to the erection of these houses, and for no other purpose. A material man

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or a mechanic, seeing that his lien as such, was anticipated and prevented, or practically useless by the provisions of the mortgage, would have no recourse but to the solvency of the contractor, or the covenants of the mortgagee. Looking to the latter he finds a provision for payment of materials and work as the buildings advanced, with a pledge that the fund shall be applied to no other purpose. There were other covenants on the part of the mortgagor to be performed, but none which qualified this leading and prominent one, except that the buildings should be erected according to plan and in a given time.

Whilst the contract was scarce a month old, and things were "*in fieri*," the contractor Caskey drew the order given in evidence, in favor of the appellee Ortwine, for \$6000 in payment for bricks to be furnished by him in erecting the houses, to be built on the lots of ground leased by Rosenstock and Stein to Caskey, out of the last payments that shall be due said Caskey by the said Rosenstock and Stein, in accordance with the terms of the mortgage, etc.

This order and the acceptance of it, constituted an assignment by consent of mortgagor and mortgagees, or drawer and drawees, of so much of the fund on which it was drawn, to be paid on the performance of the conditions referred to, the terms relating to that subject. These were as to the mode and time of erecting the buildings. The contractor failing as to time, the plaintiff according to his evidence, at the instance of the defendants, undertook to complete and did complete the buildings as required. Upon this hypothesis, the Court below granted the appellee's first prayer.

The extension of the time by the appellants, as given in evidence by the appellee, substituted the latter in the place of Caskey, and entitled him to the benefit of the contract, as if the terms of the contract as to time originally had been complied with. The fund dedicated by the

contract for the erection of the buildings, could not in the hands of an assignee for valuable consideration, be encumbered with the collateral obligations of the assignor.

It is earnestly argued by the appellants' counsel, that the appellee's first and the appellants' second prayers, which, (it is said,) are based substantially on the same hypothesis of facts, so far as the question of time is concerned, are inconsistent and irreconcilable.

That the former, gave the appellee, "a reasonable time to finish the houses," and the latter required him to finish them "before the sale under the mortgage." The prayers between which this supposed antagonism exists, are the appellee's first, and the appellants' third, not second, as stated in the appellants' brief.

The second was based exclusively on the mortgage, and referred to the rights and duties of the parties resulting from its provisions.

The third is based on the inference of an extension of time, deduced from the facts set out in the appellee's first prayer, and was clearly intended as a qualification of the law announced by that prayer.

This prayer recites "although the jury may find that the time for the completion of the buildings and premises as prescribed by the mortgage, was enlarged by the defendants, and that Caskey, or Ortwine, went on with the work upon the same, after the time fixed in the mortgage by the consent of the defendants, the plaintiff is not entitled to recover, unless the jury shall find that the said buildings were completed with all the necessary out-buildings and fences, and the necessary grading of the yards before the sale of the premises under the mortgage."

This recital refers to the appellee's first prayer, not by number, or other express designation, but by repeating the concluding, and conclusive fact of the hypothesis on which the appellee's prayer was founded, (putting a part for the whole) and submitting "although the jury may so find"



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the plaintiff was not entitled to recover, unless the buildings, etc., were completed "before the sale."

The appellants' third prayer when interpreted is equivalent to saying: "Grant or admit all that is affirmed by the appellee in his first prayer, he is not entitled to recover, unless he completed the buildings not only within reasonable time, but before the sale." This is a case of qualifying, not contradictory prayers.

Where contradictory instructions are granted, confusion must follow, because it would be impossible for the jury to determine by which they should be guided, or the Court to decide by which they were governed, in rendering their verdict. Such was the case in *Adams vs. Capron, et al.*, 21 Md., 206, and *Haney vs. Marshall*, 9 Md., 215.

But no such consequence follows, where it is apparent upon the face of the prayers and the order of their succession, that the one was a qualification of the other.

The appellants' third prayer modified the appellee's first, not only in the matter of time, but in the description of work to be completed. It required the jury to find "that the said buildings were completed, with all the necessary out-buildings and fences, and the necessary grading of the yards, before the sale of the premises under the mortgage."

This could not have been designed, as a mere contradiction or denial of the proposition announced in the appellee's prayer, because that had been granted upon a different hypothesis of facts, as to the work to be completed, but adopting the appellee's theory of the extension of time by the defendants, the appellants superadded as a condition precedent to the right of recovery, that the necessary out-buildings, fencing and grading should also be completed.

The appellants' third prayer, in our judgment was an amendment of the propositions contained in the plaintiff's first and second, engrafted by reference to the evidence and conclusions embodied in them, qualifying and modify-

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ing those conclusions in favor of the appellants, but not negating them. The doctrine laid down in the appellants' third prayer, was broader than they were entitled to, but being granted them, they have no ground of appeal in that respect.

Having already intimated, that the plaintiffs' obligation under the accepted order, required only the completion of the buildings, "in accordance with the terms of the mortgage," by which, the whole sum of money to be advanced was to be expended in the purchase of materials for and defraying the expenses of erecting said houses, and for no other purpose whatever, we think the appellants' fourth, fifth, sixth and seventh prayers, were properly rejected.

Ortwine was, by operation of the order and its acceptance by the drawees, assignee of a fund dedicated to specific objects, to be accomplished within given time, according to certain approved plans.

The time being waived, and other pre-requisites complied with, he became entitled to his money without deduction or abatement.

To make him liable for ground rents, interest, drainage, or other liabilities of his assignor, for breach of other covenants in the mortgage, would be to divert the fund from the purposes to which it was pledged, and deprive the plaintiff of the benefit of his materials, labor and skill, and of the waiver of his assignor's default.

*Judgment affirmed.*

(Decided 8th March, 1877.)

MARY J. TIMANUS, SARAH J. TIMANUS, HENRY GROSS, and others *vs.* HARRIET B. DUGAN and CUMBERLAND DUGAN.

*Construction of a devise—Rule in Shelley's Case—Contingent remainder—Question whether a limitation over, was after an indefinite failure of issue—Res inter Alios—Adverse possession—Statute of Limitations.*

A testatrix died in the year 1835, leaving a will dated June 24th, 1835, containing the following clause: "I also give and devise unto my daughter C. N. all my lands in the State of Maryland *during her natural life, and if she leave lawful issue, then I give and devise the same to the said issue in fee; but should she die without lawful issue, then and in that case I give and devise the same to my other daughter A. B. wife of J. B. during her natural life, and after her death, to the heirs of her body then living in fee.*" C. N. died in the year 1871, unmarried and without issue. A. B. died in the year 1836, leaving surviving her, her husband J. B., who died in the year 1846, and two children, namely, a son T. B., who died in the year 1855, intestate, unmarried and without issue, and a daughter H. B. D., who was born in the year 1832, and married C. D. in the year 1856. On an ejectment brought by H. B. D. and C. D. her husband in the year 1875, against persons claiming under a conveyance in fee made by C. N. in the year 1849, it was **Held**:

- 1st. That C. N. took only a life estate in the lands devised.
- 2nd. That a decision made by Baltimore County Court, in a case in equity to which C. N. was a party, to the effect that C. N. took an estate in fee under said devise, did not bind the present plaintiffs, they not being parties to that proceeding, and making no claim through or under any person that was a party.
- 3rd. That the devise over to A. B. for life upon the dying of C. N. without lawful issue, was not void as being after an indefinite failure of issue.
- 4th. That said devise over was good as a contingent remainder.
- 5th. That whether A. B. took but an estate for life, or an estate tail, by force of the rule in *Shelley's Case*, was under the facts in the case unimportant

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to be decided, as in either case the plaintiffs under the admitted facts would be entitled to all the land claimed.

6th. That as the plaintiffs could have asserted no claim to the possession of the estate until after the death of C. N., (under whom the defendants claimed,) in the year 1871, they were not barred by adverse possession.

**APPEAL from the Court of Common Pleas.**

This was an action of ejectment instituted in the year 1875 by the appellees against the appellants, in the Circuit Court for Baltimore County and thence removed to the Court of Common Pleas.

According to the admitted facts, in addition to those stated in the opinion of the Court, Isabella Nelson being the owner in fee of the property in this cause on the 27th October, 1829, leased it to Francis Bealmear for 10 years with the privilege to Bealmear of buying out the rent and reversion within the term. The leasehold interest passed by mesne assignments to John Cronmiller, who took a renewal of the lease with the same privilege of redemption from Charlotte Nelson, Isabella being then dead. Cronmiller afterwards assigned the leasehold interest to Susan, wife of John Russell, who with her husband agreed to convey in fee to Ransaler Smith. Smith filed a bill in the Baltimore County Court in Equity against Charlotte Nelson and the Russells, praying that the agreement be set aside, and alleging that Charlotte did not take a fee-simple title under the will. That Court (ARCHER and MAGRUDER, J.,) dismissed the bill, deciding that Charlotte Nelson took the fee under the will. The property afterwards, after passing through several parties under renewals of the original lease similar to the first with like clauses of redemption, ultimately was conveyed in fee by Charlotte Nelson to Charles Timanus, on the 8th October, 1849. From that time until the institution of this suit the property was held by Timanus and those claiming under him.

*Exception.*—At the trial below before the Court, the plaintiffs offered the two following prayers:

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1. By the true construction of the last will of Isabella Nelson, a life estate only in the lands mentioned in the third clause of said will was devised to Charlotte Nelson, and upon the facts stated in the first admission of parties in this case, a fee-simple estate in remainder in said lands vested, upon the death of the said Charlotte, without issue, in the year 1870, in the female plaintiff, Mrs. Harriet B. Dugan, the only child then living of Ann Buchanan, who died in the life-time of the said Charlotte; and it being admitted that the land claimed in this action is the same, or part of the same land described in said clause, and that the testatrix (under whom both parties claim) was seized thereof at the time of making said will, and died seized thereof, the plaintiffs are entitled to recover the whole land described in the declaration.

2. It being admitted in this case that Isabella Nelson, the testatrix, under whom both parties claim, died in the year 1835, leaving issue, two children only, namely: Charlotte Nelson and Mrs. Ann Buchanan; that the said Ann Buchanan died in the year 1836, leaving only two children, one of whom is the plaintiff, Harriet, who was born in the year 1832, and the other of whom was her brother, Thomas Buchanan, who died in the year 1855, intestate, and without issue, and that the said Harriet was married to the plaintiff, Cumberland Dugan, in the year 1856, and that Charlotte Nelson the devisee for life, named in the third clause of the last will of the said Isabella Nelson, died in the year 1871, without issue, there are no facts or circumstances in evidence in this case upon which it is competent to find any adversary possession on the part of the defendants, or those under whom they claim, sufficient to bar the right of recovery of the plaintiff.

And the defendants offered the two prayers following:

1. If the Court, sitting as a jury, shall find that Isabella Nelson was seized of the land described in the

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declaration, subject to the operation of the lease from her to Francis Bealmear, offered in evidence, and that being so seized, she made the will offered in evidence, and that she continued so seized until her death, and that she, after making said will, died: and shall further find that said Isabella, before making said will executed the lease aforesaid, and that said lease was duly recorded; and shall further find that Samuel Bealmear and James Bealmear made and delivered the assignment to Catharine Bealmear, offered in evidence, and that said Catharine made and delivered the assignment to Cronmiller, offered in evidence; and shall further find that said Catharine, Samuel and James Bealmear, were the widow and only children of said Francis Bealmear, and that said Francis died intestate, before the date of said assignment, and shall further find that said Charlotte Nelson, executed, acknowledged and delivered the lease from her to Cronmiller, offered in evidence, and that the same was duly recorded, and that said Cronmiller executed, acknowledged and delivered the assignment from him to Susan Russell, offered in evidence, and that said assignment was duly recorded, and that said Susan Russell and her husband agreed to convey said land to Ransaler Smith, and that Record A is a duly certified copy of the proceedings therein mentioned; and shall further find that afterwards said Charlotte Nelson executed, acknowledged and delivered Exhibit E. D., No. 1, and that the same was duly recorded, and that said Beall executed and delivered the assignment to Timanus, endorsed on said Exhibit E. D., No. 1, and shall further find that said Charlotte Nelson executed, acknowledged and delivered Exhibit No. 2, and that said Charlotte Nelson afterwards executed, acknowledged and delivered Exhibit No. 3, and that said Exhibit E. D., No. 3, was duly recorded; and shall further find the matters admitted in the agreement filed in this cause, and shall further find that from the date of said Exhibit E. D.,

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No. 3, until the present time, the exclusive continuous possession of said land has been in said Charles Timanus, during his life-time, living thereon, and claiming the same as his property, and the female defendants as his widow and heirs-at-law since his death, living thereon, and claiming the same as their own property, and that said Charles died before the commencement of this suit, and that the female defendants are his widow and heirs-at-law, then the verdict must be for the defendants.

2. If the Court, sitting as a jury, shall find as facts the matters hypothetically stated in defendants' first prayer, then the plaintiffs are not entitled to recover more than one-half of the land in the declaration described.

The Court (GAREY, J.,) granted the said two prayers of the plaintiffs, and refused the said two prayers of the defendants. The defendants excepted.

A verdict was rendered in favor of the plaintiffs and judgment was entered accordingly. The defendants appealed.

The cause was argued before BARTOL, C. J., GRASON, MILLER, ALVEY and ROBINSON, J.

*William A. Fisher* and *Charles Marshall*, for the appellants.

The will of Isabella Nelson devised to her daughter, Charlotte, an estate tail in the land of the testatrix, converted into a fee-simple estate by the statute.

It does not admit of a question that such would be the construction placed upon the devise in Westminster Hall.

In *Rae vs. Grew*, *Wilm.*, 272, (*S. C.*, 2 *Wils.*, 322, though not so well reported,) a testator devised unto G. for his natural life, and after his decease, to the use of the male issue of his body lawfully to be begotten, and the heirs, male, of the body of such issue male, and for want of such male issue, then over. It was held that G. took an estate tail.

In *Shaw vs. Weigh*, 2 *Stra.*, 798, a testator devised lands to his wife for life, and, after her decease, in trust for his sisters A. and D. equally between them, *during their natural lives, without committing any manner of waste*, and if either of his sisters should happen to die, *leaving issue or issues of her or their bodies* lawfully begotten, then in trust for such issue or issues, of the mother's share, or else in trust for the survivors or survivor of them, and their respective issue or issues; and if it should happen that both of his said sisters should die without issue as aforesaid, and their issue or issues to die without issue lawfully begotten, then over. The House of Lords held that there was an estate tail in A. and D.

The case of *Denn vs. Packey* was precisely the case now before the Court. Walter Husband devised an estate to Nicholas Webb *for life, without impeachment of waste*, and *after his death, to the issue male of his body lawfully begotten, and to the heirs and assigns of such issue male forever*; and for default of such issue male, then to W. Webb for life, with remainder to the issue male of his body, and the heirs and assigns of such issue male.

It was held that N. Webb took an estate tail. *Denn vs. Packey*, 5 *Term Rep.*, (*Dun. & E.*) 299.

In *Frank vs. Stovin*, 3 *East*, 548, Richard Frank devised to Bacon Frank his estates for the term of his *natural life, without impeachment of waste, and with power to make a jointure thereout* for any future wife, and *from and after his decease then to the use of the issue male of the body of the said Bacon Frank, lawfully to be begotten, and their heirs*; and in default of such issue, then to the use of Richard Frank, &c. The Court were of opinion that Bacon Frank took an estate tail.

Cases could be multiplied for the purpose of showing what was the rule in Westminster Hall, but those alluded to have been recognized as the leading authorities.

Unless the cases of *Chelton vs. Henderson*, 9 *Gill*, 432, and *Tongue's Lessee vs. Nutwell*, 13 *Md.*, 415, are to be



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considered as introducing new doctrines, the law of Maryland does not vary from that enunciated by the English Courts. The rule in *Shelley's Case* has been adopted in this State, to the broadest extent.

Alluding to the rule, the Court of Appeals said, in *Ware vs. Richardson*, 3 Md., 545, that "whatever may have been the origin or philosophy of the rule, \* \* \* it must, with its qualifications, nevertheless, prevail as a part of our system of real law, because it has been fully recognized and adopted as the settled law of Maryland." The Court in *Horne vs. Lyeth*, 4 H. & J., 433, say "to disregard rules of interpretation sanctioned by a succession of ages, and by the decision of the most enlightened Judges, under pretence that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great land-marks of property, but would introduce a latitude of construction, boundless in its range and pernicious in its consequences."

We will endeavor to show hereafter that *Chelton's Lessee vs. Henderson*, and *Tongue's Lessee vs. Nutwell*, do not unsettle the rule. But we proceed now to show that prior to those cases, this Court certainly agreed with the English Courts.

In *Horne vs. Lyeth*, 4 Harr. & Johns., 433, the devise was as follows: "I give and devise to my daughter Catharine, the house and lot, &c., all which I give to my said daughter during her natural life, and *after her decease, I give the same to the heirs of my said daughter Catharine.*

In *Hatten vs. Weems*, 12 Gill and Johns., 86, the devise was as follows: "I give and devise to my son Henry D. Hatten, for the trusts hereinafter mentioned, one hundred and fifty acres of land, &c., to hold the same to said Hatton, and his heirs, in trust, that he permit my loving daughter, his sister, Mary R. Hatten, to have all the rents and profits arising therefrom, *during her natural life, and after her death, to her children, lawfully begotten; but if*

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she should die without lawful issue to heir the above mentioned land, then and in that case, I give and devise the said land to H. D. H., to him and his heirs forever." 12 *G. & J.*, 86.

The Court of Appeals were of opinion that Miss Hatton, (Mrs. Weems,) took an equitable estate tail. 12 *G. & J.*, 107.

The opinion in the case last cited was delivered by Judge ARCHER in 1841. In April, 1842, he united with Judge MAGRUDER in the opinion of the Baltimore County Court, that Miss Charlotte Nelson took the fee under the will of Isabella Nelson.

Relying upon such state of the law, Mr. Timanus, the father of the female appellants, accepted the lease from Charlotte Nelson in 1846, and purchased the reversion from her in 1849. The case of *Chelton vs. Henderson* was not decided until 1850, and if the Court of Appeals can be considered to have reversed the previously settled law in that case, the hardship would be especially glaring in the case of the appellants.

Judge ARCHER was fresh from the consideration of the question in *Hatton vs. Weems*, and enunciated the views of the Court of Appeals, when he declared that Mrs. Nelson's will gave a fee-simple to her daughter Charlotte.

But the cases in 9 *Gill* and 13 *Md.*, although departing somewhat from the line of the English cases, have not wholly overturned the rule in *Shelley's Case*, as applied to wills, and they will not sustain the rulings of Judge GAREY.

All that the Court decided in those cases was, that they would not apply the rule in *Shelley's Case*, "when the clear and unequivocal expressions of the will demonstrate that the intention of the testator was in direct conflict with that ascribed to him, by the application of the rule in *Shelley's Case*." 9 *Gill*, 439.

In 13 *Md.*, 423, the Court says that "the rule in *Shelley's Case* has long been recognized and adhered to, both

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in England and in this State, and we do not mean to deny or disregard its authority ; nor do we understand the decision in *Chelton vs. Henderson*, as designed to exclude the operation of that rule in the interpretation of a will, to any greater extent, than to hold that where the intention of the testator to create no larger estate in the first devisee than for life, is *clearly expressed by the will*, such intention must prevail."

In both those cases, the Court carefully enumerates the *expressions*, which they regard as unequivocally showing such intention of the testator.

In *Chelton vs. Henderson*, they comment on the provision, that if Isaac should have issue, then *after* the death of Isaac, such issue should have the estate in fee-tail—and also upon the fact that the devise was only of the *use* of the property for his life. 9 *Gill*, 438.

In 13 *Md.*, 424, the Court carefully enumerates the expressions which are regarded as showing such intention.

In the will of Mrs. Isabella Nelson no such expressions can be found, and the language is such as has been held frequently to give an estate tail. It is submitted that there is nothing in the will to indicate the intention to cut Miss Charlotte Nelson's estate down to a life interest, except the words "*during her natural life*," and to hold that these are sufficient, would be to repeal the statute, for there is no case for the application of the rule where they are not employed.

But the Court in its search for *expressions*, is limited by the established rules of construction. It will not disregard the rule in *Shelley's Case*, merely because of such general expressions as those found in the present will.

"The intention of the grantor is to prevail \* \* , but with this qualification, that it must not contravene or defeat the established rules of construction ; or in other words, the intention is to be ascertained by the legal rules of interpretation." *Ware vs Richardson*, 3 *Md.*, 459.

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In England the word "issue" is construed as a word of limitation and not of purchase, unless the contrary clearly appears. 2 *Jarman on Wills*, 328, *ch.* xl.

The same presumption prevails in this State, though not to the same extent. 9 *Gill*, 437.

Notwithstanding the ruling of the Court below, there can be no doubt whatever, that Charlotte Nelson was seized in fee of an undivided half, even if the operation of rule in *Shelley's Case* did not vest the fee of the whole in her.

The devise over to Ann Buchanan was after an indefinite failure of issue of Charlotte Nelson, and was void, and if we are not justified in our first position, Mrs. Isabella Nelson died intestate of the remainder in fee, which became vested in Charlotte Nelson and Ann Buchanan, as the heirs-at-law of Isabella Nelson. It has been repeatedly decided in Maryland that a limitation over, if the devisee should die without issue, imparts an indefinite failure of issue. In *Dallam vs. Dallam's Lessee*, 7 *Harr. & Johns.*, 236, the Court of Appeals said that it had been "established by more than fifty cases," and probably no decision to the contrary can be found in any Court in this State, except the ruling in this case.

The law for this State was fully settled by *Dallam vs. Dallam*, 7 *H. & J.*, 236, and *Newton vs. Griffith*, 1 *H. & G.*, 111.

In *Tongue's Lessee vs. Nutwell*, 13 *Md.*, 415, the testator devised the land to his daughter for life, and if she left issue, he gave it to the issue in fee, according to the construction placed on the peculiar expression in the will; and there was a limitation over to the testators in case his daughter should die without leaving issue. This was held to import an indefinite failure of issue. So far as the question now under discussion is concerned, it is impossible that two cases could be more completely identical. See

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the argument also of Mr. Dorsey and Mr. Alexander, pp. 417-18.

In *Torrance vs. Torrance*, 4 Md., 23, the Court construed the will as giving *life* estates to the daughters of the testator, (the special expressions being the directions to hold for the separate use of the daughters, who were *fèmes covert*,) and as giving the fee to the children of the daughters.

The will provided as follows: "In the event of the decease of any of my aforesaid daughters, without leaving any child or children, or descendants of such child or children, the part or share of the estate hereinbefore devised to her or them, so dying, shall descend to and be divided among," &c. This language was held as importing an indefinite failure of issue. *Torrance vs. Torrance*, 4 Md., 24-5; *Watkins vs. Sears*, 3 Gill, 492.

In *Woollen vs. Frick*, 38 Md., 437, Judge MILLER says that "it cannot be doubted, that if the will contained simply a devise to A. for life, and 'in case he shall not leave issue or descendants,' then over, the limitation over, as to real estate, would be void. These words according to their settled legal construction, import a general or indefinite failure of issue, and whenever found in a will, must be taken in their technical legal sense, unless there be something clearly demonstrating a different intention on the part of the testator, restricting them to a definite failure of issue, or a failure of issue at the death of the first taker."

This states the law succinctly; and no such restrictive words can be found in the will of Mrs. Nelson.

Another case bearing a close resemblance to that under consideration, is *Jackson vs. Dashiel*, 3 Md. Ch. Dec., 257, in which the Chancellor held the limitation over to be too remote.

For a convenient collection of the English cases upon this question, see *Jarman on Wills*, chapter xlii.

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*Arthur W. Machen*, for the appellees.

The rule is well settled, that where there is devise to A. for life, and after A's death, to his or her issue, with words of limitation superadded to the gift to the issue, as to such issue *and their heirs*, or, what is equivalent, to such issue *in fee*, the issue take as purchasers; and there is no room for the operation of the rule in *Shelley's Case*. *Shreve vs. Shreve*, 43 Md., 382; *Tongue's Lessee vs. Nutwell*, 13 Md., 415; *Chelton vs. Henderson*, 9 Gill, 432; *Slater vs. Dangerfield*, 15 M. & W., 273.

Where there is a devise to A. for life, and upon A's death a gift to the issue of A. and a limitation in the will with reference to them, which has the effect of giving them a fee-simple, and there is also a gift over, in case of A's dying without issue, the words "dying without issue" do not import an indefinite failure of issue, but refer to such issue as were before mentioned. *Shreve vs. Shreve*, 43 Md., 382; *Turner vs. Withers*, 23 Md., 42; *Montgomery vs. Montgomery*, 3 Jo. & Latouche, 47; *Goodright vs. Dunham*, 1 Douglas, 267; *Doe d. Cooper vs. Collis*, 4 Term Rep., 300; *Leeming vs. Sherratt*, 2 Hare, 16, 17; *Page Wood V. C.*, (Lord Hatherley,) *Kavanagh vs. Morland, Kay*, 24, 25; *Golder vs. Cropp*, 5 Jurist, N. S., 562; *Doe vs. Laming*, 2 Burrow, 1100, 1110; approved by SUGDEN, 3 Jo. & Lat., 52; *Ginger vs. White, Willes*, 355, 366; *Baker vs. Tucker*, 3 Ho. Lds. C., 106; 2 Eng., L. & Eq., 1; *Daniel vs. Whartenby*, 17 Wall., 639; *Bradley vs. Cartwright*, Law Rep, 2 C. P., 511; *Hilleary vs. Hilleary*, 26 Md., 287.

In such a case, in the language of Lord Chancellor SUGDEN, the testator, by superadding words of limitation to the gift to the issue, "translates his own language, and clearly shows that he uses the word 'issue' as synonymous with 'children.'" *Ryan vs. Crowley*, 1 Lloyd & Gould, 10.

The opinion in the late case of *Shreve vs. Shreve*, which was not published when the case was tried below, contains

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so exhaustive a review of the previous decisions, and so clear a statement of what must be regarded as the present state of the law on the whole subject, that any more extended reference to authorities would be superfluous.

It is noticeable, however, that the testimony in the latest editions of *Jarman on Wills*, to the tendency of the more recent decisions in England to return to the rational principles of interpretation which prevailed in the time of Lord MANSFIELD and Lord KENYON, and were illustrated in *Goodright vs. Dunham*, and *Doe vs. Collis*, received the sanction of the Court in *Bradley vs. Cartwright*, *L. R.*, 2 *C. P.*, 511.

In support of the referential construction, (the strong tendency towards which of the recent cases is remarked by the editors of *Jarman*,) as applicable to a case like this, the following passage in the 3rd English Edition, (1861,) vol. 2, 427, 428, may be referred to.

“Where the prior gift is expressly to ‘issue,’ though restricted by the context to issue of a particular class, or existing at a prescribed period, it seems more obvious to apply to the objects of such prior gift the words importing a failure of issue, (the term being identical in both clauses,) than where the prior gift is in favor of *children*.” 2 *Jarman on Wills*, 3rd English Edition, (1861,) 427, 428, (364, 365, *Lib. Ed.*)

That observation is made in that part of chapter xl, which treats of dispositions of personalty; but the reason is equally strong in cases of devises of realty. And see *Ridgeway vs. Munkittrick*, 1 *Dru. & War.*, 92, 93; and see 2 *Jarm. on Wills*, 3rd *Ed.*, 440.

ALVEY, J., delivered the opinion of the Court.

The questions that are presented in this case arise upon the construction of the last will and testament of Mrs. Isabella Nelson, late of the City of Philadelphia, who died in the year 1835. The will bears date the 24th of

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June, 1835, and was executed in manner and form to pass real estate in this State. The testatrix left surviving her two children; Charlotte Nelson and Ann Buchanan, wife of James Buchanan. The clause of the will that is here involved reads as follows: "I also give and devise unto my daughter, Charlotte Nelson, all my lands in the State of Maryland, *during her natural life, and if she leave lawful issue*, then I give and devise the same *to the said issue in fee*; but should she die *without lawful issue*, then and in that case I give and devise the same to my other daughter, Ann Buchanan, wife of James Buchanan, *during her natural life*, and after her death *to the heirs of her body then living, in fee.*" Miss Charlotte Nelson was never married and never had issue, and she died in January, 1871. Mrs. Ann Buchanan, the other daughter, died in 1836, leaving surviving her her husband, James Buchanan, and two children, namely, Thomas Buchanan, who died in the year 1855, intestate, unmarried and without issue; and Harriet B. Dugan, one of the plaintiffs in this cause, who was born in the year 1832, and was married to Cumberland Dugan, the other plaintiff, in the year 1856. James Buchanan, the father of Thomas and Harriet B., died in the year 1846.

1. Upon the construction of the recited clause of the will, the first question is, What estate did Charlotte Nelson take in the lands devised? On the part of the plaintiffs it is contended that she took only an estate for life; while on the part of the defendants it is insisted she took an estate in fee-tail, which, by operation of the statute, was converted into a fee-simple estate.

To a mind untrained and uninfluenced by the technical rules of the common law, as applied in the construction of wills, we suppose there could be no doubt as to what was really designed to be accomplished by the testatrix. Giving to the language employed its ordinary import, we are plainly told what right or estate she designed the



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several devisees to take, and upon events she designed the estate to vest. To her daughter Charlotte she devised the lands *during her natural life, and if she left lawful issue*, then she devised the same *to the said issue in fee*; and, in default of such issue, over to her other daughter for life, and after her death to the heirs of her body then living, in fee. According to the ordinary reading and understanding of this language, the daughter Charlotte would take but a life estate, and the issue, if she left any, would take the fee-simple estate in the land. But the ordinary meaning and understanding of the language employed in a devise are frequently restrained and controlled by force of certain technical rules of construction, which have been applied from the early ages of the common law, and which have become fixed rules of property. And the question here is, whether the plain intent of the testatrix, as manifested in the language employed by her in the devise before us, shall be controlled and made to yield to the well known rule in *Shelley's Case*, 1 Co. Rep., 104, whereby, if a devise be to one for life, and afterwards, in the same instrument, there is a limitation, either immediately or mediately, to his heirs generally, or heirs of his body, he takes an estate in fee-simple or fee-tail in possession in the one case, and in remainder in the other.

Now, it is contended, the word "issue," as used in the devise before us, is synonymous with, and means, "heirs of the body," and that the devise is therefore brought within the rule just stated; and that such is generally the case, in the absence of any explanatory or qualifying expressions, may be conceded to be the well established doctrine of the law. But the term *issue* may be employed either as a word of purchase or of limitation, as will best effectuate the testator's intention; and it is much more flexible than the words "heirs of the body." Courts more readily interpret the word *issue* as the synonym of children, and as a mere description of the person or persons to take,

than they do the words "heirs of the body." As is said by Mr. Preston, "the word *issue* is not *ex vi termini* within the rule in *Shelley's Case*. It depends upon the context whether it will give an estate tail to the ancestor." *Preston on Estates*, 379; *Lyles vs. Diggs*, 6 H. & J., 373; *Lees vs. Mosley*, 1 Y. & C., 589; *Slater vs. Dangerfield*, 15 M. & W., 273; *Daniel vs. Whartenby*, 17 Wall., 639. As a word of limitation, it is collective, and signifies all the descendants in all generations; but as a word of purchase it denotes the particular person or class of persons to take under the devise. And the question is, whether, in the devise under the consideration, the word should be construed as a word of limitation, or as a word of purchase, denoting the person or persons to take? If it be taken as a word of limitation, then Miss Charlotte Nelson took an estate tail, which was enlarged by the operation of the statute to an estate in fee-simple; but if it be taken as a word of purchase, she took an estate for life only.

It is laid down in 3 *Cruise's Dig.*, tit. 38, C. 14, sec. 48, p. 360, that where an estate is devised to a person for life, remainder to his issue, with words of limitation superadded, the word *issue* will in that case be considered as a word of purchase; and for this proposition the cases of *Luddington vs. Kime*, 1 Ld. Raym., 203; *S. C.*, 1 Salk., 224; *Backhouse vs. Wells*, 10 Mod., 181; and *Doe vs. Collis*, 4 T. Rep., 294, are cited. In the first of these cases the devise was to A. for life, and if he had issue male, then to such issue male and his heirs, and if he died without issue male, to B. and his heirs. It was held that A. took but a life estate, and that both the remainders were contingent. In the case of *Backhouse vs. Wells*, the devise was to one for life, and after his death to the issue male of his body, and to the heirs male of the bodies of such issue, and it was there held that the first taker took only an estate for life; and in the case of *Doe vs. Collis*, the testator devised his estate to his two daughters, to be

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equally divided between them, viz: one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body and *their heirs* for ever; and it was held that the second daughter took only an estate for life, with remainder to her children as purchasers. These cases, and the principle maintained by them, although criticised by text writers of high authority, have been sanctioned and adopted by the Courts of this State, as was fully shown in the recent case of *Shreve vs. Shreve*, 43 Md., 382, and in which latter case the doctrine of *Luddington vs. Kime*, 1 Ld. Raymond, 203, was re-affirmed and applied to its full extent. In the case of *Shreve vs. Shreve* the clause of the devise involving the question now under consideration, when stripped of its verbiage and reduced to its legal elements, as stated in the opinion, was to the child of the devisor *for life*, remainder to the issue of such child, lawfully begotten, and to *their heirs* for ever; and it was because of the superadded words of limitation that the word *issue* was there construed to be synonymous with *children*, and therefore a word of purchase. Without the superadded words of limitation, the devise would, according to the rule in *Shelley's Case*, have created an estate tail in the first taker; but, to give effect to all the terms of the devise, the superadded words of limitation had the effect of annexing the inheritance to the person or persons answering the description of issue, so that the inheritance was in the issue, and not the first taker. And if the devise under consideration was to the first taker for life, and if she leave lawful issue, then to said issue and *their heirs* for ever, the question would seem to be entirely concluded by the cases already referred to, and others to which reference could be made; and it only remains to inquire whether the superadded words "*in fee*" are equivalent to the legal terms for limiting a fee-simple estate.

The usual and ordinary words for conveying a fee-simple estate, are "heirs" or "heirs and assigns for

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ever," but a devise to a man "for ever," or to one "and his assigns for ever," or to one "in fee-simple," will pass an estate of inheritance to the devisee, notwithstanding the omission of the legal words of inheritance. *Co. Litt.*, 9b; 2 *Bl. Com.*, 108. And in a case in South Carolina, where the devise was to A. for life, remainder to his issue *for ever*, it was held that the words "for ever," being equivalent to a limitation in fee to the issue, they took as purchasers. *Myers vs. Anderson*, 1 *Strobh. Eq.*, 344. This, we think, is in accordance with the common sense of the matter; and in the case before us, we think the words "in fee" are fairly to be construed to mean fee-simple. That is their ordinary signification, and it is a short way of expressing an estate in fee-simple, that is in very general use. We take those words as equivalent to the words "their heirs;" and our conclusion is, upon the authorities referred to, that Miss Charlotte Nelson took but a life estate in the lands devised.

It appears, by a record offered in evidence, that the Baltimore County Court, as a Court of equity, on a bill filed by one Smith against Charlotte Nelson, and John Russell and wife, in 1842, decided that Charlotte Nelson took a fee-simple estate under the devise in question. That proceeding, of course, does not bind the present plaintiffs, not being parties thereto, and they make no claim through or under any person that was a party. There were no reasons assigned for the decree that was passed, and however much respect we may entertain for the opinion of the learned Judges who determined the question, we have been compelled, by force of authority, to dissent from the conclusion at which they arrived.

2. Having decided that Miss Charlotte Nelson took only a life estate in the land devised, it is next contended that the devise over to Ann Buchanan was after an indefinite failure of issue of Charlotte Nelson, and was, consequently, void, as being too remote; and, upon that supposition, Mrs.

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Isabella Nelson died intestate of the reversion in fee, which became vested in Charlotte Nelson and Ann Buchanan as heirs-at-law of their mother; and as the defendants claim under Charlotte Nelson all the right and estate that she could convey, the plaintiffs would only be entitled to recover to the extent of one-half of the land described in the declaration; and in support of this position special reliance is placed upon the case of *Tongue's Lessee vs. Nutwell*, 13 Md., 415.

We have just decided that the devise to the issue of Charlotte Nelson was the same thing as a devise to her child or children; that the word *issue*, as used in the devise, is a word of purchase, and not of limitation, and that if the life tenant had died leaving lawful issue that issue would have taken a fee-simple estate in the land devised; and we think, upon rules of fair construction, the words "lawful issue," used in describing or designating the event upon the happening of which the estate was devised over, should be taken to refer to and mean the same thing as the words "lawful issue" in the immediately preceding devise; that it would defeat the manifest intent of the testatrix to hold that the devise over in the event of the first taker dying without lawful issue means, not children, but an indefinite failure of issue, that is to say, the failure of all descendants in future generations. In the case of *Ryan vs. Crowley*, 1 Ll. & Gould, 7, where a similar question arose, Sir EDWARD SUGDEN, then Chancellor of Ireland, said: "It is then objected, that the limitation over is to take effect after the general failure of issue, and is, therefore, too remote; but I cannot consider the clause to mean the failure of issue generally, but the death of the particular class of issue, viz: the first line of issue, the child or children to whom the property is given by the preceding sentence." And as authorities for the same construction, see the cases of *Montgomery vs. Montgomery*, 3 Jo. & Latouche, 47; *Kavanagh vs. More*

land, *Kay*, 16; *Bradley vs. Cartwright*, *Law Rep.*, 2 C. P., 511; and *Daniel vs. Whartenby*, 17 Wall., 639.

In the case of *Luddington vs. Kime*, before referred to, the Court held, not only that the superadded words of limitations constituted the word "issue" a word of purchase, but that the limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder in fee, and that the devise over of the remainder to B. was a fee also; but that those fees were not like one fee mounted on another, nor contrary to one another, but two concurrent contingencies, of which either would start according as it happened; so that the remainder were contemporary and not expectant one after the other. Or, as it may be more accurately stated, the devise over takes effect as an alternative contingent remainder, in the event of their being no issue to take the fee as purchaser. *Golder vs. Cross*, 5 Jur., N. S., 252.

Further examination of the question is unnecessary. It may be considered as settled by this Court in the recent case of *Shreve vs. Shreve*, 43 Md., 400. And we are of opinion that the devise over, upon the dying without lawful issue of Charlotte Nelson, to Ann Buchanan for life, and after her death to the *heirs of her body* then living, in fee, was good as a contingent remainder; but whether Mrs. Buchanan took but a life estate, or an estate tail, by force of the rule in *Shelley's Case*, is, under the admitted facts of this case, unimportant to be decided, for in either case the plaintiffs would be entitled to recover all the land claimed.

The case of *Tongue vs. Nutwell*, 13 Md., 415, relied on by the defendants, seems to have proceeded upon the conclusion that there was nothing in the will there construed to clearly indicate an intention on the part of the testator that the words "and on failure of such issue, then to vest," etc., should be restricted to a failure of issue at the death of the first taker. In this case, we think it clear and

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unmistakable that the words "lawful issue," immediately preceding the devise to Mrs. Buchanan, were designed by the testatrix to have the same meaning precisely as the similar words immediately following the devise to Miss Charlotte Nelson.

It results from what we have decided to be the true construction of the devise in question, that the Court below committed no error in granting the prayers on the part of the plaintiffs, and in rejecting the first prayer on the part of the defendants. And as to the defendants' second prayer, it being admitted and shown that they claim under the late Miss Charlotte Nelson, who died in January, 1871, and as the plaintiffs could assert no claim to the possession of the estate until after her death, it follows that the Court was right in refusing that prayer as well as the first.

We must, therefore, affirm the judgment.

*Judgment affirmed.*

(Decided 8th March, 1877.)

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EDWARD KEARNEY vs. STATE OF MARYLAND.

*Act of 1872, ch. 316, relating to Appeals in Criminal Cases—  
No appeal lies under the Act except upon Bill of Exception—  
No appeal in other cases till after final judgment.*

By the Act of 1872, ch. 316, an appeal is given in criminal cases, but only from rulings and determinations of the Court in the course of the trial, as is practiced in civil cases.

But where bills of exception are taken and an appeal is prosecuted under the Act, the final judgment is required to be withheld or suspended until the questions presented by the bills of exceptions are decided by the Court of Appeals.

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Where no exceptions are taken no appeal lies under the Act; the right of appeal under that statute, being confined exclusively to the cases where exceptions are taken in the course of the trial.

An order overruling a demurrer to an indictment, is not the subject of a bill of exception, and therefore is not within the provisions of the Act of 1872, ch. 316.

That ruling, could properly, only be reviewed on writ of error, or a proceeding in the nature of a writ of error, as prescribed by Rule 1, for the Regulation of Appeals to this Court, 29 *Md.*, 1; and which could not be resorted to or availed of by the party until there is a final judgment against him.

On appeal from an order overruling a demurrer to an indictment taken after verdict and before any judgment was rendered, it was **HOLD** :

- 1st. That the case was not in a condition to be removed by writ of error, or proceeding substituted for that writ, and the appeal must be dismissed.
- 2nd. That when the final judgment should have been rendered, it would be competent for the accused to take the proceeding substituted under the rule for the formal writ of error. But it would be done by virtue of his right at common law, and not under the Act of 1872.

**APPEAL from the Criminal Court of Baltimore City.**

The appellant was indicted in the Court below, for receiving United States five-twenty bonds knowing them to have been stolen. A demurrer to the indictment was overruled by the Court, (GILMOR, J.,) and the case proceeded to a trial, and resulted in a verdict of guilty. Before any judgment was rendered the traverser appealed.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER, ALVEY and ROBINSON, J.

*Frank X. Ward* and *R. Stockett Mathews*, for the appellant.

*A. Leo Knott* and *C. J. M. Gwinn*, Attorney General, for the appellee.



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ALVEY, J., delivered the opinion of the Court.

The motion to dismiss the appeal in this case must prevail.

There was no bill of exception taken in the trial of the cause, as authorized by the Act of 1872, ch. 316. An appeal is given by that Act in criminal cases, but only from rulings and determinations of the Court in the course of the trial, *as is practiced in civil cases*. But where bills of exceptions are taken, and an appeal is prosecuted under the Act, the final judgment is required to be withheld or suspended until the question presented by the bills of exceptions are decided by the Court of Appeals. As no exceptions were taken no appeal lies under the Act; the right of appeal under that statute being confined exclusively to the cases where exceptions are taken in the course of the trial. In this case, the ruling from which the appeal is taken was made in overruling a demurrer to the indictment, which was not the subject of a bill of exception, and therefore not within the provisions of the Act of 1872, ch. 316. That ruling could, properly, only be reviewed on writ of error, or a proceeding in the nature of a writ of error, as prescribed by Rule 1 for the regulation of appeals to this Court; 29 Md., 1; and which could not be resorted to or availed of by the party until there is a final judgment against him. Here, there has been no final judgment rendered, and consequently the case was not in a condition to be removed by writ of error or proceeding substituted for that writ. When the final judgment shall have been rendered, then it will be competent to the accused to take the proceeding substituted under the rule for the formal writ of error, in order to have the judgment on demurrer reviewed by this Court. That will be done by virtue of his right at common law, and not under the Act of 1872.

*Appeal dismissed.*

(Decided 8th March, 1877.)

THE NORTHERN CENTRAL RAILWAY COMPANY vs.  
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

SAME vs. SAME.

*Question in regard to the extension of Calvert and North streets across the tracks of the Northern Central Railway Company in the City of Baltimore,—as to whether the same should be by viaducts or raised ways, and whether the cost of constructing and maintaining the same should be borne by said Company or by the City of Baltimore.*

The law is well settled that where a new way or road is opened or made across a way or road already existing and in use, the new way must be so constructed as to cause as little injury as possible to the old way or road.

Under proceedings by the street commissioners of the City of Baltimore, for condemning and opening North and Calvert streets, from John street to North avenue, the proof showed that the tracks of the Northern Central Railway Company at those points were laid, and their road was in use some time before the said proceedings were commenced, and that the whole of its land was necessary for the tracks of its road, and that the situation of said tracks with reference to said street was such, that the only mode in which the proposed streets could cross the tracks without great injury, both to the company and the city, was by viaducts or raised ways of some description. **HELD:**

That said streets must cross the land and tracks of the railway company by viaducts or raised ways so as to allow its trains to pass below.

In view of a proposed change in the route of said railroad within the city, an ordinance, (No. 77,) was passed September 26th, 1868, requiring the grades of certain named streets crossing the line of the new route of said railroad, to be raised *by the Mayor and City Council of Baltimore*, so as to enable the railroad company to construct its railway tracks under said streets, and providing that all open cuts along one of said named streets, "and other streets shall be tunnelled by the said railway company." **HELD:**

1st. That in construing this ordinance, the location of the railroad at the time, and its consequent inconvenience to the public, and disadvantage to

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the neighboring property holders, as well as the then condition of the streets of the city, and the topography of the ground, over or through which the new railway tracks were to be constructed, and the streets of the city had been located and opened, or located only on the city plat, must be kept in view.

2nd. That as North and Calvert streets, so far as the railway company's property was concerned then existed only on the city plat, the said company had the right to use its property as if no such streets were contemplated by the city authorities, and to lay its railway tracks upon it.

3rd. That said ordinance should not be held to impose upon the railway company the burden of constructing and maintaining viaducts for North and Calvert streets, over its land and railway tracks, unless such be its plain language; and that the language used could not be held to refer to those streets.

4th. That the ordinance not having changed the rights and liabilities of the parties in respect to North and Calvert streets, they remained as they were at common law, as if the ordinance had never been enacted; and the viaducts for said streets over the land and railway tracks of the railway company, must be constructed and maintained by the city at its own cost and expense.

5th. That in the condemnation and opening of said streets, damages and benefits must be assessed to the railway company, with reference to the mode of crossing its land and tracks by viaducts or raised ways.

#### APPEALS from the Baltimore City Court.

The cases are stated in the opinion of the Court.

*First Exception.*—The appellant the Northern Central Railway Company offered to prove by competent witnesses what would be the cost of the construction of a suitable viaduct to carry Calvert and North streets over the tracks of the Northern Central Railway Company, claiming that if, by the proper construction of the laws and ordinances applicable to the case, it was the duty of the appellant to construct the same, that then the cost of such construction was an element to be taken into consideration by the Court in assessing the damages to which the appellant was entitled to be allowed in these proceedings; but the Court (BROWN, J.,) was of opinion, and ruled as matter of law,

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that by the true interpretation of the laws and ordinances applicable to the case, the appellant was bound to construct said viaduct at its own expense, and that therefore the cost of said viaduct could not properly form an element to be taken into consideration in estimating the said damages, and rejected said evidence so offered by the appellant. The appellant excepted.

*Second Exception.*—The appellant proved by competent evidence that the ground on which the tracks of the Northern Central Railway Company are constructed, where Calvert and North streets cross the said Northern Central Railway Company between John street and North avenue, is low, level, meadow land. and was so at the time said tracks were constructed, and at the time the Ordinance of the Mayor and City Council of Baltimore, No. 77, approved September 26th, 1868, was passed, and that said railway tracks where the same cross said Calvert and North streets, are laid on the surface of said level, low land, and that no cutting was made or required in the constructing of said railroad tracks where the same cross North and Calvert streets, and on the ground lying between these streets, but that whatever alteration was made in the natural surface was made by filling; that said railway tracks on their way into the city, after crossing Calvert and North streets, cross, among other streets, Hoffman, John and Belvidere streets, and that the ground at each of said streets on the line of said tracks is high ground, and that it was necessary in constructing said railroad across said streets to do so by deep open cuts, which across John and Belvidere streets, have been tunnelled by said Northern Central Railway Company, said street being graded, and used streets at the time of the construction of said railway, and at the time of the passage of the ordinance of Sept. 26th, 1868, while said tracks where they cross Hoffman street, are still in a deep open cut, said street not having been then yet opened or graded.

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And further proved that at the time of the passage of the said ordinance of September 26th, 1868, Charles, Eager and John streets, were paved streets.

The appellant further proved that the grade and topography of the ground on the line of North and Calvert streets as proposed to be opened, is such, that both of said streets can be constructed over the property of the Northern Central Railway Company by means of a viaduct crossing, and that considering the location and situation of the adjacent property and established grades of John and other streets, such a mode of crossing for said streets, would be the proper one for the interest of the City of Baltimore, and that said streets could not be constructed over said property of appellant by means of an embankment or even at grade, without serious and unnecessary injury to the appellant and its railway tracks and appurtenances.

And further proved that the ground on the line of North and Calvert streets, at John street, and between that street and the property of appellant going northwards, and again beyond the property of appellant and between it and North avenue, is high ground, and much higher than the ground of appellant on the line of said two streets, and that the said ground of appellants is a valley between hills on the one side and on the other.

The appellant further offered evidence proving that all of the ground belonging to appellant on Calvert and North streets, as proposed to be opened, is used and required for railway purposes, and is not more than is required and proper for such purposes.

And appellant offered evidence tending to prove that the opening of said streets would be of no benefit to appellant nor to its property, but would damage the same to some extent even if said streets were carried across by a viaduct, said damage being caused by the abutments or columns of the said structure.

The evidence being closed, the appellant offered the two following prayers:

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1. It having been proven to be practicable to construct North and Calvert streets by means of viaduct crossings over the property of the appellant, mentioned in the proceedings, and that considering the location and situation of the adjacent property and established grades of adjacent streets, it is shown that such crossings are the proper ones for the interest of the City of Baltimore; and it also appearing that said streets cannot be constructed by means of an embankment, or even at grade, over said property, without very serious and unnecessary injury to the appellant, therefore the Mayor and City Council of Baltimore can only construct the streets, by viaduct crossings, and can only condemn the right to construct in such manner; and the estimate of damages should be made subject to such duty of the Mayor and City Council of Baltimore, to construct and maintain such viaduct at its own expense.

2. The evidence in this cause having shown that the property designated on the damage plats for opening North street as B and E, and for opening Calvert street as D, was acquired by the Northern Central Railway Company for railroad purposes, and is now used for said purposes, and that the said property is required for the proper and convenient conduct of its business at said points, the Mayor and City Council of Baltimore, in constructing and carrying the said streets across and over the said property of the said company, is bound to, and shall, so construct and carry the same over the said property, as not to interfere with the reasonable uses and enjoyment by the said company of the said property for its present railway tracks and any additional tracks it may require in the conduct of its business to be laid on the said property, and so as also not to obstruct the passage of trains over the said tracks, the evidence in this cause having established that such a mode of construction of the said streets is practicable and proper; and that if the said streets shall be constructed and carried

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over and across the said property of the said company in any other way than on a level with the present grade of the railroad track, they shall be so constructed and carried by bridges or viaducts designated and erected in such a manner that the reasonable uses of the said property for the location of the tracks of the said company and the passage of its trains thereon shall not be interfered with; and that the cost of the erection and maintenance of the said bridges or viaducts in perpetuity, shall be borne by the Mayor and City Council of Baltimore; and that the damages to be allowed to the appellant in these proceedings shall be estimated upon the basis that the said streets shall be carried and constructed through the property of the appellant in such mode and manner as not to interfere with or destroy the reasonable uses of its property for railroad purposes; and the appellant is also entitled to compensation for whatever damage, if any, may result from the taking of the said property for the construction of the said streets.

The Court (BROWN, J.,) refused to grant the said two prayers and filed the following opinion:

“ These cases come to this Court on appeal by the Northern Central Railway Company from the awards of the street commissioners of the City of Baltimore assessing benefits and allowing damages for the opening of Calvert and North streets, northwardly to North avenue, the northern boundary of the city, and they have been submitted to the Court for its decision without the intervention of a jury.

“ These streets will cross the property of the appellant in places now occupied by railroad tracks appertaining to its road; some of these tracks connect with the Baltimore and Potomac Railroad, some with the Union Railroad and some with the Western Maryland Railroad, while some extend to the station of the appellant on Calvert street in the city, and others run northward forming the main line of the appellant's road. *Sixty-one* trains daily pass over

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those which are in the neighborhood of the Union Depot on Charles street, and they are in constant use for making up trains as well as for transportation of freight and passengers ; the connection of the tracks with the road of the Baltimore and Potomac Railroad is authorized by the ordinance of the city, of May, 1869, sec. 10 ; the connection with the Union Railroad is authorized by section 9, of its charter, contained in the Act of 1870, ch. 119 ; and the connection with the Western Maryland Railroad is authorized by the ordinance of the city, of 1875, No. 97, approved May 24th, 1875. The city commissioners have condemned a portion of this property of the appellant for the crossings of said streets as indicated by the plats filed in the case, and the questions presented are: 1st. What property or what right should be condemned? 2nd. What damages, if any, should be allowed appellant ; and 3rd. Is the appellant or the appellee to pay the expense of the street crossings?

“The same questions of law arise in each case, and the facts in each are substantially the same. It is in proof that all the tracks and all the space condemned are necessary for the proper working of the appellant's road. It is manifest that if the streets should cross the tracks at the existing grade of the latter, they would very seriously interfere with the business of the appellant, and would thereby inflict on it great loss and injury. The tracks as now laid are much below what must be the established grade of the streets when they shall be opened, and if the tracks should be raised to the proper grades of the streets, the sudden and considerable increase of grade of the tracks would be such as nearly, or perhaps *entirely*, to destroy the traffic of the appellant ; the amount of injury which would thus be inflicted on the appellant could not well be estimated ; moreover, if these streets should cross the tracks either at their present grade or at any grade suitable for the purpose of the railroad, the streets would



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become almost worthless for the purpose of passage or transportation by reason of the constant use of the tracks for railroad purposes.

“The only mode then in which the streets can cross the tracks without great injury both to the appellant and the public, is by a viaduct or raised way of some description, and this is the mode clearly prescribed by the City Ordinance of Sept. 26th, 1868, No. 77. By this ordinance the appellant was authorized and required to remove its tracks from the position they formerly occupied, to the place where they now are, and the removal has since been made by the appellant in pursuance of and in obedience to this requirement. The permission of the city was necessary for the removal of the tracks to their present position, because the streets are under the control of the city authorities, and cannot be used by a railway company for its tracks without their sanction. All the provisions of the ordinance became binding on the appellant when it availed itself of the permission given. The appellant accepted the ordinance by acting under it. The preamble recites that ‘it is desirable that railway tracks in the city should be so constructed as that they should cross or pass along the streets below the grade thereof, whenever practicable,’ and adds ‘that the Northern Central Railway Company desires to remove the tracks of its railway leading to Calvert Station from its present location to the northeastern side of Jones’ Falls, and desires so to construct its new tracks as that whenever they cross or pass along streets the said tracks shall be constructed below the grade of said streets wherever such method of construction is practicable.’ The preamble thus plainly declares the object and extent of the ordinance, and would furnish a safe guide to its meaning if there were any ambiguity in the subsequent provisions. It is the declared purpose both of the city and the appellant that the new tracks shall be constructed by the appellant below the grade of the streets

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wherever such method of construction is practicable. In the case of these streets it is clearly practicable.

"The 1st section carries out by express enactment the general intent declared in the preamble; it provides that the grade of Charles street, between Hoffman and Lanvale streets, and the grade of Eager street, between North and Buren streets, be raised and changed under the direction of the Mayor and City Council, so as to enable the Northern Central Railway Company to construct its railway under said streets, and *all open cuts along Hoffman and other streets shall be tunnelled by the said Railway Company.* The tracks of the appellant are now laid on the soil in a manner which the Court considers an open cut within the meaning of the ordinance, in the places where they are to be crossed by Calvert and North streets; and they are, therefore, by the express words of the ordinance, required to be there tunnelled by the appellant.

"The word tunnelled is manifestly used in contradistinction to open cutting. The open cuts along or across the streets are to be 'tunnelled,' that is to say, covered over in the manner of a tunnel by the appellant; a tunnel is defined to be a subterranean passage for a canal or road. '*Worcester Dic., in loca.*' 'In general, tunnels are formed through hills in order to avoid the expense of an open cutting.'

"In this case, as these open cuts pass through a hollow, not a hill, and as the streets are to be carried over them, the word 'tunnelled' can only mean covered over in the manner of a tunnel by an arched or raised structure shaped like a tunnel, and more usually called a viaduct.

"Thus understood the clause in question is perfectly intelligible, and the whole ordinance is consistent and carries out the declared intention of the appellant and the appellee, while any other construction would render the clause absurd and unmeaning, and would make the section inconsistent with the preamble.

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“If there were any doubt about the meaning of the clause, which I think there is not, it is made plain by the language of the preamble quoted above. Two prayers have been offered by the appellant, both of which assume that the tracks are to be crossed by viaducts, but they maintain that the viaducts are to be built by the city at its expense, and that the appellant is entitled to such damages as it may sustain by reason of such viaduct. I think it clear, from the preamble and the first section, as I have already said, that the viaducts or tunnels are to be constructed by the appellant and not by the city. But it is contended that it is shown by the 2nd section of the ordinance that the expense of the viaducts is to be borne by the city. The language of the section is as follows: ‘Section 2nd. And be it enacted and ordained, that all expenses incurred in making said changes of grades, including the tunnelling and repaving of all paved streets, shall be paid by the said Northern Central Railway Company.’

“The changes of grade mentioned in the 2nd section, refer to the changes of grade of Charles street and Eager street, ordered to be made in the 1st section, both being *paved* streets, and being the only streets in which a change of grade was made necessary by the ordinance; as this change of grade was to be made *under the direction of the Mayor and City Council*, there was good reason why there should be an express provision that the expense should be paid by the appellant, otherwise it would have been contended that the city should provide for the cost, and the tunnelling and repaving mentioned in the 2nd section refer expressly to *paved streets only*. They therefore include Charles and Eager streets.

“The ‘tunnelling’ includes also John street (although it was not mentioned by name) because it was then paved. It was the only other street to be crossed which was then paved, but its grade was not changed, and it therefore did not require to be repaved. The entire section refers exclu-

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sively to paved streets, and therefore does not relate to the work to be done by appellant in tunnelling the open cuts as directed in the first section, including said open cuts at the crossing of North and Calvert streets, nor does it refer to the work to be done in removing the old tracks, as required by the third section, as to all this work the principle applies that as it is to be done by the appellant in carrying out a plan designed by it for its own benefits, it should be paid for by the appellant. The only right condemned is that of crossing the property of the appellant by proper tunnels or viaducts to be erected by the appellant at its expense, and as this is required to be done by the ordinance, and as the appellant must be considered to have received an adequate consideration therefor in the privileges conferred by the ordinance, the appellant is not entitled to damages. I therefore reject the prayers of the appellant.

"The commissioners have allowed the nominal damages of one dollar to the appellant for each of the two crossings of North street, and they have allowed the sum of \$5142 for the crossing of Calvert street. The reason of these allowances is not explained by the commissioners in their proceedings, but I am informed that only nominal damages were allowed in the case of North street, because the street had been previously dedicated to the public, and that the damages were allowed in the case of Calvert street, which had not been so dedicated, as a compensation for the value of the property crossed. But as all these crossings are to be tunnelled by the appellant in accordance with the ordinance, and as the uninterrupted use of the crossings beneath the raised ways is, according to the ordinance, to be retained by the appellant for railroad purposes, I think that only nominal damages should be allowed in each of the cases. In the matter of the benefits assessed against the Northern Central Railway Company, I am of opinion that these should be struck out, and only

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the nominal sum of \$1.00 in each case should be assessed for benefits. Having determined that the bridge structures, by which each of these streets will be carried over the property of the said company, must be erected at the sole cost and expense of said Northern Central Railway Company, and being satisfied by the evidence that the adjacent lots are required for railroad purposes, I do not think that the company can with justice, be assessed for benefits, and having reduced the damages of \$5142.84, awarded by the commissioners in favor of the company in the case of Calvert street, to the nominal sum of \$1.00 and retained the damages allowed by them in the case of North street at the nominal sum of \$1.00, I shall also reduce the award of benefits to the same amount, that is to say the sum of \$1 00 in each case.

"In conformity with this opinion, I do hereby confirm the damages allowed in the case of North street, and set aside the damages allowed in the case of Calvert street, and instead thereof allow the nominal damages of \$1.00 in said case; and I do hereby set aside the benefits assessed in each case, and award the nominal sum of \$1.00 for benefits in each case, the costs to be paid by the Mayor and City Council of Baltimore."

The appellant excepted, and took these appeals, and the parties, entered into and filed the following "Agreement:"

"It is hereby agreed, that the opinion of the Court filed in this cause by the Chief Justice, shall form part of the record in the case, and that said opinion as to such parts thereof as bears on the construction and interpretation of the laws and ordinances of the State and city, and as to all other matters of law therein decided, shall be considered as rulings made by the Court on matters of law at the trial of the cause, and the same shall on appeal by either party, be subject in all respects to review in the Court of Appeals, to all intents and purposes as if embodied in formal instructions."

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The causes were argued before BARTOL, C. J., STEWART, BOWIE, BRENT, GRASON and MILLER, J.

*Bernard Carter*, for the appellant.

It is the duty of the tribunal having proper jurisdiction of the matter in cases of this kind, to declare that the highway shall be constructed on that plan as shall interfere as little as possible with prior existing rights and easements, is fully established. See *Manser vs. N. & E. R. R.*, 2 *Eng. Rail. Cases*, 380; *Tuckahoe Canal Case*, 11 *Leigh*, 79, 80, 81; *Kyle vs. Aub. & Roch. R.*, 2 *Barbour's Chancery*, 490.

The proceedings for the condemnation and opening of these streets were not had until the beginning of the year 1875; the appeal being taken March 20th, 1875. The railway of the appellant where these streets when opened would cross, had been constructed and been in active use for a considerable period before the institution of said proceedings, (in point of fact prior to the year 1870, though the date is not given in the record.) We have to consider the case then of an *existing* road, (or highway so to speak,) and all the easements properly appertaining thereto, belonging to the appellant, and in active use, proposed to be crossed by *another* road, way or street, (by whichever of these names we may choose to designate it,) which *latter* or *new* road or way, it is now to be taken as conceded, can only be constructed across the former or *older* road or way, with a due regard to the preservation and proper enjoyment of the last mentioned road, by "a viaduct or raised way." (Court's opinion, beginning of of 1st paragraph.)

In such cases, those proposing to carry a *new* road or way across the old or existing road or way, must do so by such structure as will interfere as little as possible with the older right, and that said structure must be built and maintained at the sole cost and expense of those desiring to construct the second or new road or way.

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In support of this proposition, we refer to the following authorities. *Morris Canal Co. vs. The State*, 4 *Zabriskie*, (N. J.,) 62; *Manser vs. N. & E. R. R.*, 2 *Eng. R. Cases*, 380; *Tuckahoe Canal Case*, 11 *Leigh*, 79, 80, 81; *The King vs. Kerrison*, 3 *Maulé & Sel.*, 526; *The King vs. Inhabitants of Kent*, 13 *East*, 220; *The King vs. Inhabitants of Lindsey*, 14 *East*, 317; *Richardson vs. Biglow*, (SHAW, Ch. J.,) 15 *Gray*, 156, 157; *Purley vs. Chandler*, 6 *Mass.*, 454; *Washburne on Easements*, 197, (*star page*;) *City of Lowell vs. Proprietors of Locks, &c.*, 104 *Mass.*, 22; *City of Hannibal vs. Han. & St. Joe R. R.*, 49 *Missouri*, 481.

The principle running through these cases is, that where there is an *existing easement*, whether in the shape of a highway, or road, or way, or water-course, either natural or artificial, and another or *newer* easement is created or to be exercised, those who are interested in the *latter*, whether it be the public who wish to make a highway across an *existing* railroad, or a railroad company which wishes to make its railroad across an *existing* highway, must, in the first place, cross the existing way in such mode and by such structure as will interfere as little as possible with the prior right, and must, in the second place, be at the *cost* of this structure.

If the prior road or way *cannot* be crossed without damage to it, then the damage must be assessed and paid, if there is a right to cross given expressly or by necessary implication.

But even the right to cross or *interfere at all* with the prior easement, will not be presumed to have been intended to be granted by the Legislature, unless the presumption is a necessary one. *New Central Coal Co. vs. George's Creek Coal & Iron Co.*, 37 *Md.*, 564; *Union R. R. vs. Balt. & Havre de Grace Co.*, 35 *Md.*, 224.

The principle above referred to is thus stated by Chief Justice PARSONS, in 6 *Mass.*, 454, stated, and adopted by *Washburn on Easements*, p. 197, (*star page*.)

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"If the *public* locate a way across an *existing* water-course, either natural or *artificial*, the *public* must make and maintain a *bridge* across the same. But if the owner of the soil constructs a water-course under a highway already *existing*, he must make and keep in repair the bridge."

Again, in 15 *Gray*, 156, 157, (above cited,) in a case where the defendant had an easement in the shape of a race-way, and plaintiff had also an easement in the shape of a right of way on a line which would cross this race-way, Mr. Chief Justice SHAW thus states the law with his usual precision :

"The plaintiff's was not an actual way built or in use, but was a right of way, and as such carried with it the right of *fitting it* for actual use ; but defendant was in the actual use of his race-way. Could both of these rights be enjoyed together without interference? We think they could. Defendant had a right to a race-way sufficiently wide and deep to carry off the water from the mill. If plaintiff could *not* use his right of way otherwise, he had a right to build a *bridge* over the race-way. The land travel could be carried *over* the stream, but stream could not be carried over the way ; it must retain its level. Necessity, therefore, would determine how both these rights could co-exist, and both be beneficially used.

"Then comes another rule, that he who enjoys the benefit of an easement in another's soil, must be at the *expense* of fitting, maintaining and repairing it. If, therefore, the plaintiff would enjoy the benefit of a *way*, either a foot-way or carriage-way, over the defendant's race-way, he *must erect a suitable bridge over it.*"

Again, in the *City of Lowell vs. Proprietors of Locks*, &c., 104 *Mass.*, 22, the Court say :

"It may be true where a highway is located over land across which the owner, intending to make a beneficial use thereof, has *commenced* the construction of a water-



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course, that the public easement must be subject to such prior appropriation, so that the original cost of the bridge, and the burden of its support will be on the *public*. In such a case, the bridge should be ordered *as a part of the original location* and construction of the way."

Again, in the case of *Morris Canal Co. vs. The State*, 4 *Zabriskie*, 62, it was held that where a canal having been in existence, a highway was subsequently desired by the public and laid out, the public must build and pay for the bridge required to carry the highway across the canal.

In this case, Justice ELMER says that, "at *common law*, counties were chargeable with making and repairing public bridges within their limits, unless some other person or bodies corporate were shown to be liable."

Again, in 14 *East*, 317, (*King vs. Inhabitants of Lindsey*), in a case where authority was given to improve a canal and river by making "navigable cuts" alongside, and these *new* cuts crossed an old highway in such a way as to make a bridge necessary,—

LE BLANE, J., says: "The authority given to the company to make the 'cut' which rendered the highway impassable without a bridge, must create in *them* an obligation to erect the bridge; although the word *authorize* in the Act would not of itself create the *obligation*."

And BAYLEY, J., says: "The bridge is rendered necessary for the purposes of the company, but not for the purposes of the inhabitants of the parish. The latter might have *continued to use* the ford (the *old* highway) as they did before the works, executed by the company for their own benefit, deprived them of the use of it."

It is to be noted in reference to the case just cited, that in that case, it happened that the *older* easement was that of the public, viz, the highway, which was interfered with by the *newer* one belonging to the private company, and so of course in *that* case the private company had to build a bridge. But of course, as is abundantly shown in all the

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cases, it makes no difference whether the public or the private company happen to own the older easement, it is this *older* one which has to be protected. And referring again to the language of BAYLEY, J., quoted above, and applying it to our case, we may say—

“The bridges over Calvert and North streets are rendered necessary for the purposes of the public to enable them to have a highway to the northern boundary of the city, but not for the railway company, which would be very glad to have no bridge or highway over their tracks. The latter (the R. R. Co.) might have continued to use their railway (the existing easement) as it did before the opening of streets about to be opened, made a bridge necessary.”

To the same effect are the cases of *King vs. Inhab. of Kent*, 13 East, 220; and *King vs. Kerrison*, 3 M. & Sel., 526.

It is perfectly apparent that the whole scope and object of the Ordinance of 1868, No. 77, was to indicate *how* the railroad should pass streets, that is, below the grade thereof, and not *at all* to deal with the general question of who was to defray the cost of the construction of the streets over the railroad tracks, the only streets in reference to which anything was designed to be provided on the subject of their costs were the streets then already *paved*, in reference to *which* it was provided that they should be restored to their former condition at the cost of the railway company.

That, in this view, the cost of the construction of the bridges or tunnels, though to be constructed by us, form an element of the damages to be awarded to us, we regard as conclusively established by the following authorities. *Grove vs. Ches. & O. C. Co.*, 11 Gill & J., 398; *Tyson vs. County Commissioners*, 28 Md., 525; *Kyle vs. Auburn & R. R.*, 2 Barb. Ch., 490; *Dealon vs. Boston and Concord R.*, 24 N. H., (4 Foster,) 186; *Ibid.*, 114; *March vs. Ports. & Con. R.*, 19 N. H., 372; 40 Penn., 56.

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To compel the company to build the bridges, and yet exclude their cost from the estimate of damages to be allowed when the rights over the property are condemned, in these proceedings, for the opening of these streets, is unconstitutional. It is practically taking the property without compensation. *Balto. & H. de Grace Co. vs. Union Railway Co.*, 35 Md., 230; *City of Lex. vs. McQ.*, 9 Dana, 518, 519, 520; *Cooley on Const. Lim.*, 508, (*star page*;) *Pumpelly vs. Green Bay Co.*, 13 Wall., 166; *Woodruff vs. Neal*, 28 Conn., 165.

*Jas. A. Buchanan*, for the appellee.

The obligation of the appellant is to be construed just as if the streets barred its way at the time the tracks were laid. If the city should construct these streets according to the established grade, they would present an insurmountable barrier at right angles with the company's tracks, and until, by a tunnel or otherwise, the barrier was pierced, it would be impossible to operate that portion of the road.

Full power is given by its charter, to the Mayor and City Council of Baltimore "for laying out, opening, extending, &c., any street, square, &c., &c., within the bounds of said city, which in their opinion, the public welfare or convenience may require." *Code*, vol. 2, *Art. 4*, *sec. 837*.

The right of way in the railway company must be held subject to the exercise of this power.

There can be no question made as to the right of the city to conduct its streets over the tracks of the appellant. In the absence of the ordinance, it might have been doubtful whether the city or the appellant was bound to pay the expense. But the right to cross could in no event be disputed.

There is no time fixed by the ordinance when the obligations of the appellants to pay the expense of tunnelling cross streets ceases.

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The obligation is imperative to tunnel all open cuts, and to pay the expenses of the work. These streets then, in our view of the liability created by the ordinance, are to be treated as existing at the *time*, and as crossing the road-bed, designed for the company's tracks, when the same were laid.

As to the meaning of the word tunnel, we refer to the opinion of the Court below.

It would be a very limited definition indeed, which would confine the application of the term to a bore through a hill. But it would be unreasonable to give it such narrow application in the case in hand, looking to the plain intent and object of the ordinance.

Terms of art will not be permitted to defeat the intent.

Ambiguous terms will be presumed to have been used in agreement with the subject-matter. *Smith's Com. on Stat. and Const. Law, secs. 484, 631.*

It may be suggested, too, perhaps, that the phrase "open cuts" is not to be confined to a cut of that description, made by the appellant while engaged in the work of preparing its road-bed.

If such a cut existed, from natural or other causes, it would be equally the duty of the appellant to tunnel.

If the obligation to conduct the said streets across the company's tracks is not complete by the express requirements of the ordinance, then the company must compensate the city for the condemnation of the right of way over said streets. And any fair measure of compensation would be the cost of constructing a way for the streets over the tracks of the company. *Baltimore & Havre de Grace Turnpike Company vs. Union R. W. Co. of Baltimore, 35 Md., 224.*

It also follows, that the obligation to tunnel is not limited to *paved* streets, but extends to all streets crossed by the tracks of the appellant, and that appellant's first and second prayers ought to have been rejected; and that the judgment of the Court below must affirmed.

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GRASON, J., delivered the opinion of the Court.

These two cases came before Baltimore City Court upon appeals from the Street Commissioners of the City in the matter of assessments of damages and benefits to the appellant in the condemnation and opening of North and Calvert streets from John street to North avenue. They were tried together before the Court, without a jury, and two exceptions were taken by the appellant, the first to the exclusion of the evidence set out in the exception, and the second to the rejection of its two prayers. By an agreement of counsel the opinion of the Judge of the City Court is made part of the record, and all such parts of it as bear on the construction and interpretation of the laws and ordinance of the State and City, and all other matters of law therein decided, shall be considered as rulings by the City Court, and upon this appeal shall be subject to review to all intents and purposes as if embodied in formal instructions. The judgments were in favor of the Mayor and City Council, and from them the Railway Company has taken these appeals, the facts and principles of law being exactly the same in the two cases, and both argued together.

After a very careful examination of the cases and the authorities cited by the counsel of the respective parties, we are of opinion that the City Court erred in rejecting the appellant's prayers, which, we think, correctly present the law as applicable to these cases.

The law is well settled that when a new way or road is opened or made across a way or road, already existing and in use, the new way must be so constructed as to cause as little injury as possible to the old way or road. *Manser vs. Northern and Eastern R. R. Co.*, 2 *Eng. Railway and Canal Cases*, 391, *marg.*

The proof in these cases shows that the appellant's tracks were laid and their road was in use some time before the proceedings to condemn and open North and

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Calvert streets were commenced, and that the whole of its land is necessary for the tracks of its road, and that the opening of the said streets across it at its present grade would very seriously injure its usefulness as a railroad, while the streets themselves, looking to the formation of the ground and the existing grade of other streets of the city, would be very inconvenient to the public, and the crossings at the railroad extremely dangerous. If, on the other hand, these streets were carried over the low land of the appellant by embankments or fillings, so as to raise them to a level with the grades of other streets, those parts of the tracks of the appellant's road would be destroyed, and barriers interposed to the running of its trains from the places where the embankments would be made, to its Calvert street station. We agree, therefore, with the learned Judge of the City Court, that the only mode in which the proposed streets can cross the tracks, without great injury both to the appellant and appellee, is by viaducts, or raised ways of some description. Such crossings seem to have been contemplated by Ordinance No. 77, approved September 26th, 1868, the preamble of which recites that "it is desirable that railway tracks in the city should be so constructed as that they should cross or pass along the streets below the grade thereof whenever practicable." North and Calvert streets must therefore cross the land and tracks of the appellant by viaducts or raised ways so as to allow its trains to pass below.

The next material and important question in these cases is, at whose cost and expense such viaducts or raised ways shall be constructed and maintained? At common law it is undoubtedly the rule that where a new way or road is made across another which is already in existence and use, the crossing must not only be made with as little injury as possible to the old road or way, but whatever structures are necessary for such crossings must be erected and maintained at the expense of the party under whose

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authority and direction they are made. And if the old road or way cannot be crossed without damage to it, and the right to cross is given, such damage must be assessed and paid. This principle is recognized as settled law in many well considered cases, among which we refer to *Morris Canal vs. The State*, 4 *Zabriskie*, 62; *Richardson vs. Bigelow*, 15 *Gray*, 156, 157; *Perley vs. Chandler*, 6 *Mass.*, 454; *Lowell vs. Proprietors of Locks and Canals*, 104 *Mass.*, 22; *Manser vs. Northern and Eastern R. R. Co.*, 2 *Eng. Railway and Canal Cases*, 387; *The King vs. Kerrison*, 3 *Maule & Selwyn*, 532; *King vs. Inhabitants of Lindsey*, 14 *East*, 320, 321.

The counsel of the appellee admitted this to be the established common law principle, but contended that the rule was changed in the cases now under consideration, and the burden of constructing the viaducts was imposed upon the appellant by the City Ordinance No. 77, of 1868, before referred to, and it was upon this ordinance alone that the decision of the City Court was based. It is entitled "An Ordinance to alter the grade of certain streets in the City of Baltimore;" and the preamble recites "that it is desirable that railway tracks in the city should be so constructed as that they should cross or pass along the streets below the grade thereof whenever practicable; and that whereas the Northern Central Railway Company desires to remove the tracks of railway leading to Calvert station from their present location to the north-eastern side of Jones' Falls, and desires so to construct its new tracks as that whenever they cross or pass along streets, the said tracks shall be constructed below the grade of said streets whenever such method of construction is practicable; and whereas the owners of a majority of the feet of ground fronting and binding on the streets in the first section of this ordinance, have presented to the Mayor and City Council of Baltimore their petition asking the grades of said streets may be changed between the points named in

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said first section of this ordinance." It plainly appears from this preamble that the change of the grades of the streets mentioned in the petition and ordinance, was authorized to be made for the common benefit of those owning land on said streets, and of the public generally.

The first section provides that the grades of Charles street, between Hoffman and Lanvale streets, and of Eager street, between North and Buren streets, shall be raised by the *Mayor and City Commissioner*, so as to enable the Railroad Company to construct its railway tracks under said streets; and the section then closes in the following words: "and all open cuts along Hoffman and other streets shall be tunelled by the said Railway Company." It is contended that the closing clause of the section just quoted imposes upon the Company the burden of constructing the viaducts for North and Calvert streets over its land and railway tracks. It is clear that the main object to be accomplished by the enactment of the ordinance was to raise the grades of Charles and Eager streets, between the points named, to enable the appellant's road to be constructed below said grades, and this, as we have before stated, was to be done for the common benefit of the land owners whose property fronted on the streets, and of the public generally. It was contended by the counsel of the appellee that the ordinance also conferred benefits on the appellant by giving it a new and better route for its road from the city limits to its Calvert street station; but we cannot perceive how any benefit to it was intended or was conferred by the ordinance in question, further than by raising the grade of Charles and Eager streets. The appellant, at the time of the passage of the ordinance, already had its railway constructed and in use from the city limits to its Calvert street depot, and if it desired to change its location to the northeast side of Jones' Falls it had full power and authority to make such change by the Act of 1849, ch. 532, sec. 2, and irrespective of the ordi-



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nance No. 77 of 1868. It cannot, therefore, be held that the appellant is bound, under the ordinance, to construct the necessary crossings over its tracks as a consideration for the benefits and privileges granted to it by the ordinance, as was contended by the counsel for the appellees. At the time the ordinance was passed Charles street was an important channel of communication and travel between the city and country, and the track of the appellant crossing it at grade was, no doubt, found to be a great inconvenience to the public, as well as an obstacle to the advance and extension of improvements north of the railway, and it was to remedy these evils that the ordinance was passed to raise the grades of Charles and Eager streets so as to enable the appellant's road to pass below them instead of at grade. The same proceedings were had to raise the grades of said streets as are necessary to effect the change of grade of any street in the city. A petition of the owners of a majority of feet fronting and binding on the two streets, whose grade was sought to be changed, was filed, asking for a change of the grades, and the ordinance directed the change to be made by the *Mayor and City Commissioner*. In construing this ordinance, the rights of the appellant, the objects to be accomplished by the ordinance, the location of the railroad at the time, and its consequent inconvenience to the public and disadvantage to the neighboring property holders, as well as the then condition of the streets of the city, and the topography of the ground over or through which the railway tracks were to be constructed, and the streets of the city had been located and opened, or located only on the city plat, must be kept in view. At that time North and Calvert streets had not been condemned or opened north of John street, though they were laid down on the city plat. The land of the appellant lies on the northeast side of Jones' Falls, and is low, level land, while that both north and south of it is high land. The tracks of the railway have been laid

on this bottom, level land, which required no cutting whatever until Hoffman street, not then opened, but located on the city plat; was reached. Cuts had to be made through the land where Hoffman street was located, as also through John and Belvidere streets, where the ground was high. Charles, Eager, and John streets were the only streets crossed by the railway which had then been paved. Keeping all these facts in view, what does ordinance No. 77 provide with respect to the appellant or its railway tracks? It provides: First, For raising the grades of Charles and Eager streets, between the points named in the ordinance, "so as to enable the Northern Central Railway Company to construct its railway tracks under said streets;" and, next, "That all open cuts along Hoffman and other streets shall be tunnelled by said railway company." It has been seen, however, that the whole of the ground between Charles and the location of Hoffman street is low and level and required no cutting, and none was made, the railway tracks having been laid on the surface of the ground. It cannot be supposed that the framers of the ordinance ever contemplated that *open cuts* would be made, in constructing the railroad upon such ground, which was on a level with the main line of the appellant's railroad, or that they ever thought that *tunnelling* would be required where no *open cuts* could be made. The closing part of the first section of the ordinance must be, therefore, applied to such streets only through which *open cuts* were necessary for the construction of the railway. North and Calvert streets, so far as the appellant's property was concerned, then existed only on the city plat, and the appellant had, therefore, the right to use its property as if no such streets were contemplated by the city authorities and to lay its railway tracks upon it. This principle was held by our predecessors long before the passage of the ordinance in question, and the Mayor and City Council having been parties to the case, must be held to a knowledge of it at the time

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this ordinance was passed. In the case of *Moale vs. The Mayor and City Council of Baltimore*, 5 Md., 322, the City sought to open a street through Moale's property and to allow him only nominal damages, because, when he purchased the property, a street through it had been located on the city plat. But this Court, through LEGRAND, Chief Justice, said: "It is not incumbent on the city authorities to adhere to the line of the streets as laid down in the city plat. The power to widen, open, or close up any street in the city rests entirely in the discretion of the corporation. A person, under these acts (1817 and 1838,) may, for an indefinite space of time, be deprived of the use of his property, because it lies in the bed of a street designated on the plat of the city, and eventually find, whilst he has paid taxes and been denied the advantages to which he was entitled from the proper use of his land, the street laid down on the plat has been abandoned. Such a state of things is repugnant to every notion of justice and cannot obtain our consent." In view of all the facts, we think that the ordinance, No. 77, should not be held to impose upon the appellant the burden of constructing and maintaining viaducts for North and Calvert streets over its land and railway tracks, unless we are compelled to do so by its plain language. We think that the language used in the first section cannot be held to refer to the streets named, because at that time they existed only on paper, and the ground over which they would pass, if extended, required no *open cutting* for the construction of the railroad, and, consequently, no *tunnelling*; and, further, because the language can be fully gratified by applying it to Hoffman street, which is expressly required to be tunnelled, and John and Belvidere streets, which are near the location of Hoffman street, and which it was necessary to tunnel, and which have been tunnelled by the appellant. The words "other streets," used in the first section, are fully gratified by their application to John and Belvidere streets.

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But even if the first section, taken alone, was of doubtful construction, when taken in connection with the second section, all doubt is removed. The second section deals exclusively with the cost and expense of the changes provided for by the first, and specifies in express terms what part of it is to be borne by the appellant. It enacts that "all expenses incurred in making said changes of grade, including tunnelling and repaving of all paved streets, shall be paid by said Northern Central Railway Company."

The only expense imposed by this section upon the appellant is expressly limited to that of *making the said changes of grade*, that is, the changes of grade of *Charles* and *Eager* streets, including the cost of tunnelling and repaving the streets *which were then paved*, to wit: *Charles*, *Eager*, and *John* streets. These streets being then streets graded, paved, and in use as streets, it was, no doubt, thought to be only right and equitable that the appellant should bear the cost and expense of repairing the damages which would be done to said streets by taking up the pavements and cutting through them in the construction of the railroad. The appellant was, therefore, required to bear the expense of repaving these streets, including the cost of tunnelling, in addition to that of changing the grades of *Charles* and *Eager* streets, they being the only streets whose grades it was necessary *to change* in order to enable the railway to pass below them. The remainder of the expenses were not provided for by the ordinance, but were left to be provided for, under the general system of the city government for condemning, grading, and paving streets, at such times as the city should, in its discretion determine to proceed with such work. The second section having, in express terms, provided what part of the expense shall be borne by the appellant, it cannot, by implication, be subjected to any other or greater expense.

The ordinance not having changed the rights and liabilities of the parties to these cases in respect to North and

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Calvert streets, they remain as they were at common law, as if the ordinance had never been enacted, and it follows, therefore, that the viaducts for said streets over the land and railway tracks of the appellant must be constructed and maintained by the appellee at its own cost and expense.

From this it also follows that, in the condemnation and opening of said streets, damages and benefits must be assessed to the appellant with reference to the mode of crossing its land and tracks hereinbefore decided to be the only proper one; that is, by viaducts or raised ways.

In the view we have taken of these cases it becomes unnecessary to pass upon the first exception.

*Judgment reversed, and  
cause remanded.*

(Decided 8th March, 1877.)

HENRY BLAKE *vs.* WILLIAM H. PITCHER and YOUNG  
O. WILSON, trading as PITCHER & WILSON.

*Bills of Exceptions — Mechanics' lien — Agency — Question whether materials used in the erection of building, were furnished with reference to that building, and under a contract with the owner or his agent—Taking a promissory note does not operate as a waiver of the lien claim.*

A bill of exceptions to the ruling of a Court on demurrer to pleadings is an anomaly in this State.

A bill of exceptions stated, that having "offered evidence tending to prove the hypothesis of fact set forth in their prayer," \* \* \* "thereupon the plaintiffs offered the following prayer." **HELD:**

That this mode of presenting in the bill of exceptions, a question of law, arising upon any given hypothesis of facts, is conformable to the new rules prescribed by this Court.

A mechanics' lien claim was filed in the Superior Court of Baltimore City, by P. & W. against B. as owner of certain houses in Baltimore City, and H. as contractor. The bill of particulars consisted of charges for bricks furnished by P. & W. to B., from the 24th of May, 1873, to the 10th of July, inclusive. Under a proceeding by P. & W. to enforce their lien upon said houses, it was **HELD:**

1st. That if the bricks were furnished for the houses with the privity and consent of the owner, and were used in the erection of his buildings, it was no defence to the action, that the owner bought the said bricks for the contractor H., and paid H. for the same; or that the said bricks were not furnished by the plaintiffs in pursuance of a contract with the owner; or that said bricks were sold by the plaintiffs to H. not in the capacity of architect, builder or contractor for the houses, but merely as a manufacturer or seller of bricks.

2nd. That if H. was the agent of B. for the purchase of bricks from P. & W., it was immaterial whether or not he occupied also the relation of contractor for building the houses, or contractor for furnishing the bricks.

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- 3rd. That the receipt by P. & W. of a promissory note of H. for part of the purchase money for the bricks, although such note was not shown to have been lost, and was not produced in Court to be cancelled, did not extinguish the portion of their claim covered by said note.
- 4th. That it is not true that *any* material man furnishing a contractor or subcontractor, with articles which are afterwards used in the erection of *any* building, thereby acquires a lien on that building. But such lien will be acquired, if the materials are furnished in pursuance of a contract with the owner of the building as such or with his agent.

APPEAL from the Superior Court of Baltimore City.

*First and Second Exceptions*—stated in the opinion of the Court.

*Third Exception.*—The plaintiffs, to sustain the issues joined on their part, offered evidence tending to prove the hypothesis of fact set out in their prayer; and the defendants to maintain the issues joined on their part, offered evidence tending to prove the hypothesis of fact set out in their prayers; and thereupon the plaintiffs offered the following prayer:

1. If the jury find that the plaintiff, Pitcher, on behalf of himself and the plaintiff Wilson, called upon and had a conversation with the defendant, Blake, in which conversation the plaintiff, Pitcher, proposed to said Blake, that said plaintiffs should sell to said Blake pressed bricks, for the fronts of houses in Eutaw Square, mentioned in the evidence, and that said Blake answered said Pitcher, that he, said Blake, had made a trade of a house with one Samuel K. Harris for the bricks required for said houses, but that he, said Blake, did not know if said Harris made the particular sort of pressed bricks required for said fronts, and said Pitcher replied that said Harris did not make such pressed bricks, and thereupon said Blake said to said Pitcher, "*go and see Harris, and if he don't make those bricks, I should like to have you furnish them, and any arrangement Harris may make with you will be satisfactory to me.*"

And if the jury further find from the evidence that afterwards the said plaintiff, Pitcher, on behalf of himself and said plaintiff, Wilson, had a conversation with Samuel K. Harris, in which said plaintiff told said Harris what said Blake had said in reference to said bricks, and Harris answered said plaintiff, Pitcher, that he, said Harris, had not the bricks suitable for the fronts of Blake's buildings and would have to buy them, and would be willing to get them from the plaintiffs, and asked the price at which plaintiffs would sell said bricks, and the plaintiff, Pitcher, said at thirty-five dollars per thousand; and the plaintiff, Pitcher, on behalf of himself and said plaintiff, Wilson, thereupon agreed with said Harris to furnish said bricks to the said buildings Blake was about to build, and said Harris directed the plaintiffs to furnish said bricks on said Blake's orders therefor, and when they were ready for them at the buildings. And if the jury further find that the defendant, Blake, was the owner or reputed owner of the buildings and premises mentioned in the lien and *scire facias* amongst the proceedings, at the times of the furnishing of the materials by the plaintiffs as hereinafter mentioned, and shall further find that after the conversations of the plaintiff, Pitcher, with the defendant, Blake, and after the conversation of the plaintiff, Pitcher, with the said Samuel K. Harris as aforesaid, the plaintiffs furnished and delivered to the said buildings and premises the materials, viz., pressed bricks and long arch bricks, mentioned in the lien and evidence, at the instance of said Harris, and with the knowledge of the said Harris, and that said materials were by the said defendant, Blake, and with his, the said defendant's, Blake's, knowledge that the same were materials furnished and delivered by said plaintiffs, used in the erection of said buildings and premises, then their verdict may be for the plaintiff, provided the jury further find that notice in writing was given to said defendant, Blake, by said plaintiffs, within



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sixty days after the furnishing of such materials as aforesaid, of the intention of said plaintiffs to claim the benefit of a lien upon said buildings and premises.

And then the defendants offered the five following prayers:

1. The defendants pray the Court to instruct the jury, that if they are satisfied from the evidence that the defendant, Henry Blake, was the owner and builder of the houses on Eutaw Square, spoken of in these proceedings and referred to by the witnesses, and that as such owner and builder he bought the bricks required for and used in the construction of said houses of the defendant, Samuel K. Harris, and paid said Harris for the same; and shall further be satisfied from the evidence that said Samuel K. Harris was at the time a manufacturer of bricks, and sold and delivered said bricks to said Blake in the regular prosecution of his business as a manufacturer and seller of bricks, then the plaintiffs are not entitled to recover in this action, even although they should find that said Harris bought from them a part of the bricks which he so delivered to said Blake, and their verdict will be for the defendants.

2. If the jury find from the evidence that the defendant, Blake, was the owner of the houses mentioned in the lien claim filed in this cause, and also that he was the builder and only party contracting for the erection and construction of the same; then, unless they further find that the bricks mentioned in said lien claim were furnished by the plaintiffs in this cause in pursuance of a contract with said Blake, the plaintiffs are not entitled to recover, and their verdict must be for the defendants.

3. If the jury find from the evidence that the defendant, Harris, was not the architect, builder or contractor of the houses mentioned in the lien claim filed in this cause, but was a manufacturer and seller of bricks, and that the plaintiffs in their business of manufacturing and selling

bricks, (if they find such to be the business of the plaintiffs,) sold to the said Harris the bricks mentioned in the said lien claim, then the plaintiff is not entitled to recover in this action, and their verdict must be for the defendant.

4. Unless the jury find from the evidence that the materials mentioned in the lien claim filed in this cause were purchased by a contractor or builder of the houses therein named, and that notice in writing of the plaintiffs' intention to claim a lien for the payment of said materials was given to the owner of said houses within sixty days after furnishing the same, the plaintiffs are not entitled to recover in this action, and their verdict must be for the defendants.

5. If the jury find from the evidence that the plaintiffs received from the defendant, Samuel K. Harris, his promissory note for a part of the purchase money of the bricks, then the plaintiffs are not entitled to recover in this action for such portion of their claim as was covered by such note, there being no evidence that said note has been lost, and the same not having been produced in Court to be cancelled.

And the Court, (DOBBS, J.,) granted the plaintiffs' prayer and refused to grant the defendants' prayers. The defendants excepted.

The jury rendered a verdict for the plaintiffs, and judgment was entered accordingly. The defendant, Blake, appealed.

The cause was argued before BARTOL, C. J., STEWART, BOWIE, BRENT, GRASON and MILLER, J.

*Henry Stockbridge*, for the appellant.

By well settled Maryland law the plaintiffs, having received a promissory note for their debt, which they did not produce in Court, nor show to have been lost, were estopped from prosecuting their claim against the defen-

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dant. *Glenn vs. Smith*, 2 G. & J., 508; *Myers vs. Smith and Barrick*, 27 Md., 50.

But the principal,—the important—question presented by the pleadings and the prayers, is, has the producer of building materials, who sells them to another dealer in like materials, who is not a builder, or contractor, but who sells them in turn to a builder or contractor, a right to follow those materials with a lien to the remote user of them, and hold his property responsible for them, although he has, in good faith, paid for them to the person of whom he bought them?

Such a proposition, utterly repugnant to justice and right, has no foundation in reason or statute.

The right of lien in our State, as applicable to cases like this, rests upon the first and eleventh sections of Art. 61. of 1st Code, 405, 406. If it is not there it can be found nowhere.

Section 1 gives a lien upon every building erected for the payment of all debts contracted for work done or materials furnished for or about the same.

Section 11 limits the operation of section 1, by providing that persons entitled to a lien under section 1 shall pursue a particular course, or shall "not be entitled" to a lien for any materials furnished. It is a limitation, a restriction, (not an extension, an enlargement,) of the privilege granted by the first section. No person acquires a right of lien by virtue of the provisions of the eleventh section who has it not by virtue of the first section; and no person, of the class to which it refers, who are entitled to a right of lien by virtue of the first section, retains it unless he complies with the requirements of the eleventh section.

Under a proper construction of this statute, the producer of building materials, who sells them to a dealer in such materials, cannot follow them with a lien through the hands of a dealer, or chain of dealers, and charge the builder with the payment of the dealer's debt.

If this can be done, it is impossible for any person to build anything with safety. The builder may buy his material of the merchant, and pay for it in good faith, and after this is done, find his house bound for the payment of the merchant's debt, to the manufacturer of hardware in Connecticut, or England, or to the producer of lumber in Pennsylvania, or Maine.

A construction of a statute that involves such an absurdity, and injustice, will not be adopted by the court, if it can reasonably be avoided. In this case the statute, not only does not require such a construction, but does require a different construction. Its phraseology clearly requires that there shall be some privity or contract between the person imposing the lien, and the person whose property is charged by it.

The debt which is to give the right of lien must be "for materials furnished for or about" the building. Consequently they must be furnished to some one expressly or impliedly authorized to incur a liability for the owner. But the merchant, trader or dealer in building or other material, is not, *virtute officii*, authorized to contract debts, for the owners of property to pay, for the materials which he (the trader) has sold to such owners, and for which they have paid him.

Neither can the materials which are sold to a merchant, or dealer in materials, to be sold or disposed of by him in the way of his business or trade, with any propriety be said to be "furnished for or about the building" into which they ultimately find their way. The manufacturer of the materials produces them for his own profit through their consumption in the buildings to which they are adapted; and he sells them that they may find their way, through one or two, or a dozen hands to their ultimate place of consumption. But his sale to the dealer is not a furnishing for or about the building in which they are ultimately used, within the meaning of the law.

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This is the construction given in New York to a law quite as broad in its terms as our own. *Wood vs. Donaldson*, 17 *Wend.*, 550.

The words of the Pennsylvania statute are, "Every building erected \* \* \* shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same." *Dunlop's Laws of Penn.*, 779; *Phillips on Lien Laws*, sec. 51.

The construction given to this statute is that "no one has power to bind a building for materials furnished except the owner or contractor under him," and "one who contracts to furnish materials is not a contractor for erection, and cannot charge a building with a lien." *Harlan vs. Rand*, 27 *Penn. State Rep.*, 511; *Duff vs. Hoffman*, 63 *Penn. State Rep.*, 191.

This precise point does not appear to have ever been before this Court for adjudication. The true principle, however, is involved in the ruling of the Court in *Greenway vs. Turner*, 4 *Md.*, 304. It is there laid down that an owner of property can be held responsible for no liability of a contractor or builder independently of the provisions of the lien law. The liability to a lien "is created exclusively by Act of Assembly."

Now, the maxim of law is that a statute contrary to common law or common right is to be construed strictly, and applied only to those cases for which it was expressly intended. *Sedgwick on Statutory Law*, 285; *Domat's Rules*, sec. 16.

This statute was designed to promote improvement by affording to persons who furnished labor or materials to such improvement security for the value of their contribution to the structure. It was never intended to fetter the erection of improvements by making the owner of property responsible for the debts of the merchant from whom he purchases, and of whose relations to his creditors he

must necessarily be ignorant. It designed to impose upon the owner no heavier burden than the payment of his own debts, those contracted for him by his agent, and those contracted for his building by his architect, contractor, or builder. To open the door wider than this is to ask of him impossibilities, and to lay a peremptory and permanent injunction upon the erection of buildings.

*Joseph P. Merryman and J. J. Alexander*, for the appellees,

Cited *Weber vs. Weatherby*, 34 Md., 656; *Sodini vs. Winter*, 32 Md., 130; *Greenway vs. Turner*, 4 Md., 296; *Coulter vs. Freeze*, 45 Ind., 96; *Hill's Case*, 38 Penna. St., 151; *Buell vs. Barker*, 35 Ind., 297; *Derrickson vs. Nagle*, 2 Phila., 120.

BOWIE, J., delivered the opinion of the Court.

The appellees filed their claim for a lien under the Mechanics' Lien law, against the appellant, Henry Blake, as owner, and Samuel K. Harris, contractor, on the 7th January, 1874, in the Superior Court of Baltimore City.

The bill of particulars consisted of charges for bricks furnished by the appellees to the appellant, Blake, from the 24th May, 1873, to 10th of July, inclusive, amounting to \$1236.40.

To the *scire facias* issued on this claim against the appellant the defendants pleaded separately several pleas, on some of which issues were joined; to others, the plaintiffs filed replications, to some of which the defendants demurred, and to others rejoined, to which rejoinder the plaintiffs demurred.

The defendant's demurrer being overruled, and the plaintiffs' sustained, the defendant, Blake, appealed.

The same questions being substantially involved in the demurrers and prayers, it will be unnecessary to notice the former more particularly.

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Three bills of exceptions were taken by the appellant below, two to the rulings of the Court upon the demurrers and the third to the granting of the appellees' prayer, and the rejection of the five several prayers of the appellant.

The appellant relies only on the last bill of exceptions, but the appellees have moved to dismiss the appeal, so far as depends upon the exceptions, because they are unnecessary, insufficient, and improper in form and substance.

A bill of exceptions to the ruling of a Court on demurrer to the pleas, replications, or rejoinders is certainly an anomaly in the practice of this State. The pleadings which are a part of the record, show upon their face, the facts on which the question of law the demurrer arises, and a bill of exceptions is, therefore, wholly unnecessary.

The third bill of exceptions is objected to by the appellees because it does not sufficiently set out the evidence upon which the plaintiffs' prayer was based, but states concisely that, having "offered evidence tending to prove the hypothesis of fact set out in their prayer," \* \* \* "therefore, the plaintiffs offered the following prayer."

We think this mode of presenting in the bill of exceptions a question of law arising upon any given hypothesis of facts, is conformable to the new rules prescribed by this Court in relation to appeals. To avoid unnecessary prolixity and detail, they require, "Bills of Exception shall be so prepared as only to present to the Court of Appeals the rulings of the Court below upon some matter of law, and shall contain only such statement of facts as may be necessary to explain the bearings of the rulings upon the issues or questions involved; and, if the facts are undisputed, they shall be stated as facts, and not the evidence from which they are deduced; and, if disputed, it shall be sufficient to state, that evidence was adduced tending to prove them;" "but if a defect of proof be the ground of ruling or exception, then the particulars in which the proof is supposed to be defective shall be briefly stated,

and all the evidence offered in anywise connected with such supposed defect, shall be set out in the bill of exception." See *Rule 5, Title Appeals, 29 Md.*

The appellant's third bill of exceptions, instead of repeating the facts hypothetically stated in the plaintiffs' prayer, introduces that prayer with the preface before cited, referring to the prayer for the facts on which it was founded, which, in the language of the rule, sufficiently explained the bearing of the ruling on the question involved.

In cases like the present, where the prayer excepted to embodies all the evidence tending to support the theory of the instruction asked for, it would be wholly unnecessary to burden the record with a recapitulation of the same matter.

The appellant submitted five prayers and the appellees one.

The first four of the appellant relate to the character of the contractor and the circumstances and conditions necessary to entitle the mechanic or material man to a lien upon the building erected or repaired.

The fifth, to the effect of taking a promissory note by the material man, from the contractor, upon the proceedings for a lien.

The principle asserted by those relating to the creation of the lien is, that unless the materials were furnished to the owner, builder, architect, or contractor for the erection of the houses, in pursuance of a contract with them or some of them, although the materials were used in the construction of the buildings, with the knowledge and consent of the owner, a lien will not lie in favor of the material man against the buildings.

The appellees' prayer, asserts their right to recover if the jury find the facts embodied in its hypothesis, without basing their right upon the relation of Harris to Blake, as contractor for building the houses, or contractor for



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furnishing the bricks. Relying mainly upon the facts that the bricks were furnished Blake, after an interview with Blake, who referred them to Harris, and that the said bricks were delivered and used by Blake, in the construction of his houses, with the knowledge and consent of Blake and Harris, leaving it to the jury to determine whether the materials furnished, were furnished under a contract with Blake or Harris, or with both. In this aspect of the prayer, there is no necessary conflict between it and those submitted by the appellant. But it is argued that it is susceptible also of the broader interpretation, that if the materials were furnished under the circumstances recited, the lien lies, whether Harris was contractor for the building of the houses, or only sub-contractor for the bricks.

These prayers involve the construction of the 61st Article of the Code of P. G. Laws, Title "Mechanics' Lien."

The appellant's counsel regards the position of the appellee as "utterly repugnant to justice and right, without foundation in reason or statute."

The spirit in which the Mechanics' Lien Law is to be interpreted, has been prescribed by the Legislature and impressed in such strong terms upon its face, that no Court can mistake its meaning.

It is enacted by section 41 of Article 61, "this Article shall be construed, and have the same effect, as laws which give general jurisdiction or are remedial in their nature."

Exclusive of this directory clause, the language of the Code in other sections, indicates that the most liberal and comprehensive meaning should be given to its several provisions in favor of mechanics and material men.

"Sec. 1. Every building erected and every building repaired, rebuilt or improved to the extent of one-fourth its value, shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the same."

"11. If the contract for furnishing such work or materials, or both, shall have been made with any architect or builder, or any other person except the owner or owners of the lot on which the building may be erected, or his or their agent, the person or persons so doing work or furnishing materials, or both, shall not be entitled to a lien unless, within sixty days after furnishing the same, he or they, or his or their agent, shall give notice in writing to such owner or owners, or agents, if resident within the city or county, of his intention to claim such lien."

The decisions of this Court have all been in the same direction.

It is too late, if we were so disposed, to adopt a new line of policy in this respect.

In the case of *Sodini & Leiter vs. Winter, et al.*, 32 Md., 133, this Court, commenting on the fifth plea of the appellant, which was held bad on demurrer, said "The fifth plea is, that the materials were furnished by the plaintiffs, on the individual and personal credit of the contractor, and not on the credit of the lot and building mentioned in the writ. It does not aver the materials were not furnished for the house, or that the plaintiffs did not know at the time of furnishing them, they were to be used in its erection."

The appellant's prayers in this case are obnoxious to the same objection. They entirely ignore the evidence of the appellees tending to prove the bricks were furnished for the appellant's house, with his privity and consent, and were used in the erection of his buildings. In further consideration of the point raised on the demurrer to the plea, in the case just cited, this Court declared, "This peculiar lien does not originate in contract; it is purely a creature of positive statutory enactment, to be maintained and enforced to the extent and in the mode which the statute prescribes."

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The statute (it was said) contemplates a contract, between the material man and contractor, and that credit may be given to the latter, "and whilst there is no contract express or implied between the former and the owner, or credit given to the owner, yet the law provides a lien upon the buildings as a security for the material man, in case the contractor fails to pay for the materials, and this is done without affecting the liability of the contractor, on his contract of purchase, which still exists." "It was the liability to and frequency of loss sustained by mechanics and dealers in consequence of the employment of a middle man or contractor which induced the Legislature to give a lien on the building." *Ibid*, 134.

The first four of the appellant's prayers, are defective because founded on a partial view of the evidence. They omit all reference to the facts from which an agency on the part of Harris for the defendant Blake might be inferred. All that is affirmed in these prayers might be found by the jury, yet, if Harris was the agent of Blake in purchasing the bricks of the appellees, they were entitled to recover.

It might perhaps be argued that agency was included in these prayers by implication; still, the careful specification of Harris, as manufacturer and seller of bricks in one, and of Blake, as owner and builder in another, and the negation of Harris as architect, builder or contractor in a third, with total silence as to the relation of principal and agent between Blake and Harris were calculated to mislead the jury.

The doctrine of agency were fully recognized and asserted in the case of *Weber vs. Weatherby*, 34 Md., 656.

In that case, Weber the owner and builder, agreed to sell a house in an unfinished state to one Ranstead and to have it completed like one adjoining. Ranstead deposited \$100 as a forfeit in case of non-fulfilment of his contract.

After making the agreement Ranstead purchased of Weatherby, a range and other articles which were delivered with the knowledge of Weber, and bricked up in the cellar. Ranstead having abandoned the contract and refusing to take the house, Weber retained the house and fixtures.

It was held that Ranstead "*pro hac vice*," was the agent of Weber, and that Weber, and his house were liable. The former, according to the principles of natural justice, and the latter under the provisions of the statute, for the act of Ranstead.

The appellant's fifth prayer conflicts with the express language of the third section of the 61st Article of the Code of P. G. Laws which provides, that "no person having such lien shall be considered as waiving the same by granting such credit, or receiving notes or other securities, unless the same be received as payment or the lien be expressly waived. but the sole effect thereof, shall be to prevent the institution of any proceedings to enforce said lien until the expiration of the time agreed on."

This Court in 32 Md., 133, in the case *Sodini vs. Winter*, referring to the defence of waiver of lien by parol, attempted to be set up, declared "the law provides that no person having such lien shall be considered as waiving the same by granting a credit, or receiving notes or other securities, unless the same be received as payment or the lien be expressly waived."

The appellant's fifth prayer, does not submit to the jury to find that the note was received as payment; the prayer appears to be framed entirely upon the general principles of commercial law independently of the provisions of the Mechanics' Lien Law.

The principles announced in *Glenn vs. Smith*, 2 G. & J., 508, and *Myers vs. Smith*. 27 Md., 50, are well established, but have no application to a proceeding *in rem*. founded upon statutory enactments.

In the construction of the Code of Public General Laws or Acts of Assembly of our own State, this Court in doubt-

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ful cases, might be aided by the decisions of other States, upon statutes upon the same subjects, couched in identical language. But wherever the Code or Acts of Assembly of this State have been construed, as in this instance, we are bound to adhere to the construction adopted.

For this reason, it is in our judgment unnecessary to review the cases cited by the appellant's counsel, decided in other States, interpreting their local laws, in support of a theory conflicting with the decisions of this Court.

We do not construe the appellees' prayer as asserting that *any* material man furnishing a contractor or sub-contractor, with articles which are afterwards used in the erection of *any* building, thereby acquires a lien on that building: but if the jury find the facts as alleged, they *may* find the materials were furnished in pursuance of a contract with Blake as owner, or with Harris as agent of Blake. Concurring with the Court below in granting the appellees' prayer and rejecting the appellant's, the judgment is affirmed.

*Judgment affirmed.*

(Decided 4th May, 1877.)

KATE P. DUNGAN, Administratrix of ELIZABETH P.  
DUNGAN *vs.* THE MUTUAL BENEFIT LIFE INSUR-  
ANCE COMPANY OF NEWARK, NEW JERSEY.

*Mortgage of policy of insurance—Equity of redemption—Tender—Payment of premium—Surrender of policy by the mortgagee—Notice to the assured of surrender, or sale, necessary—Rights in the policy, acquired by party purchasing or accepting a surrender, without such notice.—The Company affected by misstatements of its agent—Limitations—Lapse of time—Notice of claim as given by a previous unsuccessful action.*

A policy of insurance on the life of D. was issued by the Mutual Benefit Life Insurance Company, on the 17th of June, 1861, for the benefit of the wife of D. It was stipulated in the policy that in the event of non-payment of any premium on the day named for its payment, the policy with all previous payments thereon, and also all interest in profits should be forfeited to the company. At the time of issuing the policy W. was the agent of the company in Baltimore, and through him the policy was obtained. For the purpose of paying the cash part of the premium due on the 17th of June, 1862, W. loaned D. and wife the money, and took their note for it at four months. The cash part of the premium was then paid, and a note given for the residue; and this was the last premium that was ever paid by either D. or his wife. At the time of taking the note for the money loaned, W. took an assignment of the policy under the hands and seals of D. and his wife, and at the same time executed to them a receipt and defeasance, by which it was stated that said assignment was received "*as security for the prompt payment at the maturity of their note,*" (describing it,) "*said assignment to be null and void upon the payment of said note at its maturity, otherwise to continue for the sole use and benefit of W.*" These papers all bore date the 17th of June, 1862. The note given to W. not being paid at maturity or afterwards, the policy was not redeemed. W. as assignee paid the premiums as they fell due in 1863, 1864 and 1865; and on the 28th of November, 1865, he surrendered the policy to the company, and received

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for its reserve value. D's wife died in August, 1868, and D. himself died in April, 1870. The former died intestate, and letters of administration upon her estate were not taken out till December, 1871. D. and wife sued the company in trover for the conversion of the policy, but failed in the action, which was not finally determined till the year 1873. On a bill in equity, filed immediately afterwards by the administratrix of Mrs. D. against the company, seeking not only to redeem the policy, but to recover the amount thereof less the amount of unpaid premiums and interest due the company, and the amount of the note with interest due W., together with the premiums paid by him while he held the policy as assignee, it was HELD:

- 1st. That any agreement in the assignment or in the defeasance, showing that the parties intended the assignment to operate as a security for the repayment of money, was all that was necessary to make it a mortgage, and such an agreement was plainly apparent on the face of the defeasance.
- 2nd. That when once ascertained that the assignment was to be considered and treated as a mortgage, then all the consequences appertaining in equity to a mortgage must be strictly observed, and the right of redemption is regarded as an inseparable incident.
- 3rd. That notwithstanding the express terms of the defeasance, that in default of payment of the note at maturity, the policy was to continue for the sole use of the mortgagee, the right of redemption was not thereby defeated after the day of payment.
- 4th. That in order to entitle the complainant to maintain her claim in this case, it was necessary for her to show by satisfactory evidence, that the assured, while it was admitted she did not pay the premiums, tendered payment of them as they became due.
- 5th. That an alleged tender of the premium due in June, 1863, even if made would not have restored the policy, no tender having been made to W. of the mortgage debt due to him then or at any subsequent time.
- 6th. That W. having paid the premium due in June, 1863, and continued to pay the premium in 1864 and 1865, and thus kept the policy alive, subject to the right of redemption, upon payment of the mortgage debt and the premiums advanced for the preservation of the security, and there having been no tender of the mortgage debt to him at that time or at any subsequent time, it was immaterial whether an alleged tender of the premium due in June, 1873, was in fact made or not. As if the premium then due had been paid by the assured, it would only have relieved W. from the necessity of advancing the premium, and not in any manner restored the policy to the control of the assured.

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After the alleged tender in June, 1863, no further steps were taken by the assured in reference to the policy until September, 1865, when inquiry at the home office of the defendant, was made by the assured, in regard to what had been done with the policy. At that time the policy was still alive, and would so continue till June 17th, 1866, and the assured was so informed by the officers of the defendant. A correspondence then ensued between the attorneys of the assured and the president of the defendant, in reference to the claim and demand of W. On the 12th of December, 1865, the president communicated the fact that the policy had been surrendered by W., the surrender having been made on the 28th of November, 1865. During this correspondence, there was no tender or offer to pay the amount claimed, or the amount actually due by W. on account of the note and money advanced for premiums. It was testified by a witness that, in May, 1866, he went to the office of the defendants in Newark, and there saw the vice-president of the company, and told him he had come prepared to pay the amount the company had named to the attorneys, as that which W. would be willing to receive and re-transfer the policy; and was then informed that the policy had been surrendered and ended. He stated that he had not the money with him, but had made arrangements for it, and would have got it in New York and sent it on from Baltimore. **Held:**

That this transaction did not amount to a tender.

After this occasion there was no other attempt to make tender either of the premiums or of the amount due W. **Held:**

- 1st. That as the punctual payment of the premiums was an essential condition to the life of the policy, and the question whether the policy should be kept in force or allowed to lapse, being entirely at the option of the assured or her assignee, the claim to redeem and enforce the policy as if in force at the death of the life insured, could not be sustained.
- 2nd. That W. holding the policy as mortgagee, held it subject to the right of redemption, provided the right was exercised within a reasonable time.
- 3rd. That W. could only sell the policy after giving due notice to the assured to redeem, and while it was competent to surrender the policy to the company either for its reserve or equitable value, as an advantageous mode of sale and foreclosure, yet it was necessary that notice should have been given to redeem before the surrender took place.
- 4th. That the party purchasing or the company accepting the surrender without such notice, would only acquire the interest of the mortgagee, and hold subject to the right of redemption as the mortgagee held before the sale or surrender.



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- 5th. That the company was affected by any misstatements made by W. in regard to the policy before its surrender.
- 6th. That the utmost candor and good faith were required in the matter, not less on the part of the company, its officers and agents, than the assured; and not only in the inception of the contract, but in all subsequent dealings in respect to it.
- 7th. That under the circumstances of the case, there appearing to have been a want of good faith on the part of the company and W., it was but just to declare that the right of redemption continued to exist at the time of the surrender of the policy; and that the surrender should be regarded as having been made on the joint account of W. and the assured, according to their respective interests; that is to say: on account of W. to the extent of the interest secured by the assignment of the policy, including premiums paid, and on account of the assured for the residue of the reserve value which the company agreed to allow W.
- 8th. That the Statute of Limitations had no application to a case like this.
- 9th. That as to the lapse of time the circumstances of the case afford full explanation of that; as Mrs. D. was a *fême covert* from the date of the policy to the time of her death in 1868, and Mr. D. her husband, was for several years immediately preceding his death in 1870, mentally unable to attend to business, and there having been no acquiescence in the claim of either W. or the company in respect to the policy.
- 10th. That an action of trover brought by D. and wife in 1866, against the company for the alleged tortious conversion of the policy, and not finally determined until 1873, although said action was misconceived, was notice to the company of the adverse claim of the assured.

**APPEAL from the Circuit Court of Baltimore City.**

The case is stated in the opinion of the Court.

The cause was argued before STEWART, GRASON, MILLER, ALVEY and ROBINSON, J.

*Arthur Geo. Brown* and *Frederick W. Brune*, for the appellant.

There never was a legal foreclosure of the equity of redemption in the mortgaged property, nor such a sale as

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divested the mortgagor of her right to redeem. 1 *Code*, Art. 64, sections 1, 5, 6, 7, 8, 9, 10, 11, 12, 13; *Schouler's Pers. Prop.*, 554, 5, 6, 7, 8; *Clark vs. Levering*, 1 *Md. Ch.*, 178, 9; *Sheckell vs. Hopkins*, 2 *Md. Ch.*, 89; *Dougherty vs. McColgan*, 6 *G. & J.*, 275; *Pratt vs. Vanwyck's Ex'rs*, 6 *G. & J.*, 495; *Farrell vs. Bean*, 10 *Md.*, 217; *Walker vs. Stone*, 20 *Md.*, 195; *Korns vs. Shaffer*, 27 *Md.*, 83; *Hinkley vs. Wheelwright*, 29 *Md.*, 341; *Baughers vs. Merryman*, 32 *Md.*, 185, 189; *Conway vs. Alexander*, 7 *Cranch*, 218; *Nesbitt vs. Berridge*, 32 *Beaven*, 282, 289; *Same Case on Appeal*, 4 *DeGex*, *Jones & Smith*, 45, 48, 49; *Bird vs. Davis*, 1 *McCarter*, (*N. J.*) 474, 5; *Wilson vs. Brannon*, 27 *Cal.*, 258; *Freeman vs. Freeman*, 2 *C. E. Green*, (*N. J.*) 45, 47, 48; *Van Brunt vs. Wakalee*, 11 *Mich.*, 177, 181; *Franders vs. Chamberlain*, 24 *Mich.*, 305; *Stoddard vs. Dennison*, 7 *Abb. Pr. Rep.*, (*N. S.*) 309; *Hinman vs. Judson*, 13 *Barb.*, 629; *Terrell vs. Allison*, 21 *Wall.*, 289, 292, 293.

The false statements made by Webb to Henry Dungan, in June, 1863, at the office of the company, in the line of its business, when Henry called to pay the premiums on his father's policy, and subsequently to Lipscomb, the company was responsible for. *Ins. Co. vs. Wilkinson*, 13 *Wall.*, 222, 234, 5, 6; *Ins. Co. vs. Mahone*, 21 *Wall.*, 152, 156.

To permit appellee to rely now (as it does in its answer) upon the fact that after June, 1862, the Dungans did not themselves pay the premiums, but that they were paid by Webb in their name, would be allowing appellee to take advantage of its own wrong.

It is to be remarked that, although Webb, when examined, denied some of the facts testified to by Henry Dungan, he denied none of Lipscomb's testimony, nor even referred to it.

This is equivalent to an admission by Webb of its truthfulness.

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Lipscomb testifies that Webb, in September, 1863, assured him that the policy was dead and surrendered to the company.

That statement was absolutely false.

But, in fact, the premiums due June 17th, 1863, 1864, and 1865 were regularly paid to appellee as required by the contract contained in the policy, and on September 20th, 1865, the president of appellee wrote to Holmes, "Mr. Francis D. Dungan is insured in this company."

At that time the policy was a valid, subsisting contract, and the premium had been fully paid, which was, according to the terms of the contract, to keep it *alive* (for the benefit of all parties interested) *until June 17th, 1866*.

Appellee itself proves that Webb intended to keep on paying the premiums until Francis Dungan's death, for his own selfish purposes it is true, but legally and really for the benefit of the Dungans as well, who, by proper proceedings, and by tendering what was due, could have set up their equity of redemption.

The president of appellee himself, and Webb, both testify that Grover, the president, persuaded Webb not to keep up the policy, but to surrender it to the company. Grover using as an argument with Webb, to induce him to surrender the policy, the fact that if Francis Dungan died while the policy was still in force, his family would get the insurance money, less what Webb had paid for premiums to keep it alive.

Thus, by a conspiracy between the appellee and its agent in Baltimore, they tried to deprive the Dungans of the insurance money, and appellant in this action seeks only to put herself in the exact position where she would have been but for appellee. Such dealings are contrary to public policy and as against appellant, void. She cannot be prejudiced by them.

Quite irrespective of the prospective value which the policy had, looking to the time of Francis Dungan's

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death, the actual cash value of the policy in November, 1865, when Webb "surrendered" it to the appellee, was very considerable.

The sum then due to Webb under his mortgage was about \$754.61.

The sum paid November 28th, 1865, by appellee to Webb, as its actual value in cash at that time, clear of Dungan's premium notes, and of all claims of the company, was.....	\$1,248 51
Deduct.....	754 61

The difference..... \$493 90

represents the profit of Webb, and gives some criterion for estimating the value of the equity of redemption, quite clear of and in addition to the more valuable *right* to keep the policy alive until Francis Dungan's death.

For the equity of redemption nothing was paid. See *Baughers vs. Merryman*, 32 Md., 193, 194.

The transfer or "surrender" of the policy from Webb to appellee was not in any proper or legal sense a *sale* to a *bona fide* purchaser. It was a mere transfer of the mortgagee's claim to a party having full knowledge of the condition of the title.

It was not made after due demand and notice for the purpose of foreclosure—or of surrender—which, in this case, would have been equivalent to a foreclosure, as nothing was due, as between the insurer and the assured, at the time of the transfer.

It was a purchase by one who was in effect a *trustee* (as appellee in fact admits itself to have been), at a forced sale from its *cestui que trust*, to its advantage and her disadvantage. *Mason vs. Martin*, 4 Md., 135; *Pairo vs. Vickery*, 37 Md., 468, 484, 5.

It was also contrary to public policy and good morals.

Appellant, on the above point, relies on the authorities previously cited and also on *Md. Fire Ins. Co. vs. Dal-*

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*rymple*, 25 Md., 265, 6, 7; *Balto. Mar. Ins. Co. vs. Same*, *Ibid.*, p. 302; *Korns vs. Shaffer*, 27 Md., 83; *Keighler vs. Savage Manf. Co.*, 12 Md., 416-17; *Hoffman Steam Coal Co. vs. Cumberland, &c., Co.*, 16 Md., 506-9; *Cumberland, &c., Co. vs. Sherman*, 20 Md., 127; *Same vs. Parish*, 42 Md., 598, 606, 607, 613, 614.

Appellee took the policy with full knowledge of the Dungans' title and claim to the equity of redemption, and of their desire and efforts to redeem it; and, having accepted the alleged surrender "with its eyes open, and having full knowledge, must be considered as standing in Webb's shoes;" (Opinion of Judge PINKNEY.) *Central Bank vs. Copeland*, 18 Md., 305, 317; *Timms vs. Shannon*, 19 Md., 297, 314; *Green vs. Early*, 39 Md., 223, 230; *Johnston vs. Phoenix Ins. Co.*, 39 Md., 233, 240, 242; *Walker vs. Stone*, 20 Md., 195, 197, 202.

Indeed, the forfeiture was attempted and carried out at the express instance and solicitation of the appellee, as has been already shown.

It is true that Grover, in his cross-examination, hypocritically pretends that he persuaded Webb to surrender the policy, because "it would not be right" to keep it alive until Dungan's death.

Why it would not have been right is not apparent, and Grover fails, when specially interrogated, to throw any light on that subject.

Although so tender upon that point, Grover seems to have no qualms of conscience about making, by this nefarious transaction, a handsome profit for his company and its agent Webb; paying over to him the premiums which had been paid on the policy since 1852, and getting rid (as he hoped) of all responsibility under the contract of insurance.

In fact appellee made itself trustee for Mrs. Dungan, and assignee of the mortgage.

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As mortgagee, Webb had no interest in the policy, beyond his debt and the premiums paid by him, with interest; (*Burridge vs. Row*, 1 Y. & Coll. New Rep., 183; 191; same case on appeal, 13 L. J., ch. 176; *Bunyon on Life Ins.*, foot p. 95, marg.;) and the assignment having been made without the concurrence of the mortgagor, the appellee, as assignee, took "the mortgage and the debt secured by it, upon the same terms and subject to the like equities and defences that it was subject to in the hands of the assignor. The mortgagor cannot be prejudiced by the assignment." *Cumberland Coal Co. vs. Parish*, 42 Md., 614; *Whitridge vs. Barry*, 42 Md., 151.

Webb, therefore, had held the policy for the benefit of himself and Mrs. Dungan in their respective capacities and rights of mortgagee and mortgagor; and if, during that time, Francis Dungan had died, there can be no doubt that it would have been not only the right, but the duty of Webb to recover the insurance money for the benefit of the mortgagor as well as for himself.

Appellee, by assignment from Webb, stepped into his shoes, and in view of the facts and the authorities cited, thereby was subjected to and assumed all the duties which Webb had owed to the mortgagor of the policy, as the necessary consequence of its acquisition of his rights as mortgagee.

And the relation of mortgagor and mortgagee was not destroyed, by the so-called "surrender" in November, 1865; which being fraudulent and inoperative to destroy the policy, as decided by the Court below, and already shown, while it extinguished the rights of Webb, did not affect those of the other parties.

Appellee by its letter of December 12th, 1865, refused to have anything further to do with the matter, but, as an extra precaution, Henry Dungan went to Newark in May, 1866, before the next annual premium fell due, to pay all that appellee had demanded and falsely alleged to be due.

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This, appellee refused to take.

Appellant was, therefore, relieved from the duty of making any further payments or tenders, and indeed deprived of all opportunity to make them.

The reply of appellee's vice-president made Henry Dungan's offer and statement equivalent to a formal tender, and was a waiver of subsequent tenders. *Bull vs. Schuberth*, 2 Md., 60; *Buell vs. Pumphrey*, 2 Md., 261; *Parker Vein Co. vs. O'Hern*, 8 Md., 201; *Tacey vs. Irwin*, 18 Wall., 549, 550, 551; *Bennett vs. Hunter*, 9 Wall., 326, 338; *Hampton vs. Rouse*, 22 Wall., 263, 274; *N. Y. Life Ins. Co., vs. Cloptin*, 7 Bush, (Ky.), 149; *Hillyard vs. Mut. Ben. Life Ins. Co.*, 35 N. J. Law, 424; *Hamilton vs. Mut. Life Ins. Co.*, 9 Blatch. C. C., 256-7, 259; *Md. Fire Ins. Co. vs. GUSDORF*, 43 Md., 507, 513.

We have now, however, to consider the effect of the non-payment of premiums on and after June 17th, 1866; and on that point appellant is now first compelled to differ from the learned Judge below.

Appellant in her bill relied on the offer to pay all that appellee had demanded, which Henry G. Dungan testifies that he made in May, 1866; and on appellee's express refusal to receive that or any other sum, *on the ground that "the policy had ended, it having been surrendered,"* and the further declaration made at the same time by the vice-president, who was the officer in charge, that "the company had nothing further to do with the matter; that the policy had been surrendered, and the value paid to Mr. Webb, the assignee."

In the same connection she should have relied also on the still stronger and more conclusive evidence on that point furnished by the letters of appellee's president, and especially on his letter, dated December 12th, 1865, in which, speaking on behalf of appellee, and writing to Mrs. Dungan's counsel, about this very policy, he says, "Mr. Webb the assignee of the policy about which you write,

having surrendered to the company the policy, and we having paid the equitable value to him therefor, we suppose *we have no further connection with the subject.*"

The learned Judge of the Circuit Court in forming his opinion, seems to have lost sight of this very important letter, and does not refer to it.

It was a distinct and formal statement, that the company repudiated any obligation to, or contract or connection with the Dungans, that the policy had been "surrendered" to and purchased and paid for by appellee, and that it was the company's exclusive property.

This letter should be read in connection with that to which it was a reply in which Mrs. Dungan's counsel say: "We deem it proper to notify you, that as your agent here refuses any settlement with our client, we shall sue your company at the next term of Court," and also in connection with Webb's declaration to Lipscomb, that "there were no conceivable circumstances under which he would give up the policy."

Any tenders or offers to pay which were or could have been made thereafter, were and would have been works of supererogation. It would have been worse than idle—in law unnecessary, and in fact absurd—to continue to pay premiums on a policy which the insurer had declared in the most formal way had ceased to exist, and after it had refused to perform its duty under the contract contained in the policy, or to recognize any rights whatsoever, present or prospective, in the assured; particularly in view of the important fact, that the policy itself was in the hands of the appellee, and the legal title to it was vested in the company under the assignment from Webb—(38 Md., 242.)

It will not do for appellee now to contend that, *because* (in consequence, as has been already shown, of its own absolute and wrongful refusal to receive premiums or to continue the contract,) no premiums were, after a certain



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time, tendered or paid, *therefore* the policy and all the rights of the assured under it, ceased to exist.

And yet that is in effect what appellee does contend for. *Parker Vein Co. vs. O'Hern*, 8 Md., 201; *Manhattan Ins. Co. vs. Warwick*, 20 Gratt., 620-1; *Williams vs. Bank of U. S.*, 2 Pet., 102; *Leslie vs. Knickerbocker Life Ins. Co.*, 2 Hun., (N. Y.) 616, 619; *Hamilton vs. Mut. Life Ins. Co.*, 9 Blatch. C. C., 257.

None of the authorities cited by the learned Judge below, or by the counsel for appellee in argument, are cases in which there was a failure to pay premiums in consequence of the fault of the insurer, or its refusal to receive them, or its waiver of tender of them.

An examination will show that they are each and all, cases in which the failure arose from the fault or misfortune of the assured. And appellant confidently believes that no case can be found in which the Courts have allowed an insurance company to take advantage of its own wrong, as appellee seeks to do in this case. *Hamilton vs. Mut. Life Ins. Co.*, 9 Blatch., 259.

As to the defence of limitations, the appellee's undertaking in the policy, was to pay \$5000 to "Elizabeth W. Dungan, or assigns, within ninety days after due notice and proof of the death of the said Francis D. Dungan." The notice was given and proof furnished through Mr. Lipscomb. Francis D. Dungan died April 22d, 1870, in the Insane Asylum at West Philadelphia. Until an administrator was appointed on the estate of Elizabeth Dungan, (who died August 14th, 1868, intestate and childless,) limitations did not begin to run. *Haslet vs. Glenn*, 7 H. & J., 17, 24; *Angell on Limitations*, 54, 55.

Complainant was appointed administratrix in December, 1871, and the bill of complaint was filed in this case November 10th, 1873.

In answer to the suggestion of appellee in its answer, and of the Court below, that Dungan and wife *might*, if

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they had been so advised, or had seen fit to do so, have filed a bill to redeem, during their joint lives, and that, because they did not, either limitations or laches may be a bar, appellant replies, as to *limitations*, that during the whole time indicated, Elizabeth Dungan was a "*fême covert*," and as such, protected by 1 *Code*, Art. 57, Sec. 2; that she died under coverture, and that, as her husband did not and could not (both because from the time of his wife's death in 1868, until his own death in 1870, he was a helpless lunatic, confined in an insane asylum, and because the policy was in the hands of the appellee,) reduce the policy of insurance into possession during his life-time, (*Knight vs. Brawner*, 14 *Md.*, 1, 7,) it devolved upon her administratrix, this appellant, (*Stockett vs. Bird*, 18 *Md.*, 484, 488-9, and *Code* 1, Art. 93, sec. 32,) who was appointed in 1871, and filed her bill in 1873. 2 *Story's Eq. Juris.*, sec. 1028 a; *Barroll's Ch. Pr.*, 417.

As to the suggested *laches* of Mrs. Dungan, appellant replies in the language of this Court, (14 *Md.*, foot p. 7 :) "Being under disability, no laches can be imputed to her," and after the death of Mrs. Dungan certainly no laches could be imputed until an administrator was appointed. *Haslett vs. Glenn*, 7 *H. & J.*, 17, 24, and other authorities cited above.

And in view of the facts of this case, appellant especially relies upon *Pairo vs. Vickery*, 37 *Md.*, 468, 484-5, and the unreported decision of the Court of Appeals of New York, in the case of *McMurray, et al. vs. McMurray*, 66 *N. Y.*, 175.

The cross-examination of Webb and Grover, under the Baltimore and Newark commissions, shows their great want of frankness in disclosing to the Court the facts of this case, and their correspondence in relation thereto, and, in connection with the facts actually proved, gives appellant the right to argue that there has been a deliberate suppression of important evidence by appellee and its said

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agents. *Mut. Ben. Life Ins. Co. vs. Hillyard*, 37 N. Y. Law, 444, 461, 470, 474 ; *Cohen vs. N. Y. Mut. Life Ins. Co.*, 50 N. Y., 610, 620, 624 ; *Sands vs. N. Y. Life Ins. Co.*, 50 N. Y., 626 ; *Martine vs. Int. Life Ins. Soc.*, 53 N. Y., 339, 344 ; *Manhattan Life Ins. Co. vs. Warwick*, 20 Gratt., 614, 620, 621 ; *Mut. Ben. Life Ins. Co. vs. Atwood*, 24 Gratt., 497 ; *N. Y. Life Ins. Co. vs. Hendren*, 24 Gratt., 536 ; *Statham vs. N. Y. Life Ins. Co.*, 45 Miss., 581.

*T. W. Hall* and *I. Nevett Steele*, for the appellee.

The legality and validity of the transactions between Webb and the Dungans, and between Webb and the company, are no longer open to question, having been already passed upon and affirmed by this Court. They are, in fact, *unimpeachable* upon any grounds. There is no dispute that the Dungans owed Webb money ; that they assigned the policy to Webb, and that, as such assignee, Webb, as he had a legal right to do, surrendered it to the company. All this this Court has decided. (38 Md., 242-255.) In passing upon the effect of the assignment of June 17th, 1862, this Court say (38 Md., 251,) that it was *either* a mortgage or a conditional sale—it not being material to the purposes of the former case to determine which. It is only upon the theory that the assignment and receipt of June 17th, 1862, taken together, constituted a *mortgage* of the policy, that the appellant has any showing or standing in Court. If it was a *conditional sale*, there is an end of the case, since this Court has expressly said that after default made, the title of Webb would, in that event, be “absolute and irrevocable, *both at law and in equity*.” (38 Md., 251.) Treating it as a mortgage, however, the right to surrender the policy equally passed to Webb as an incident to the assignment, necessary, in fact, to give to the assignment of such an investment any value as a security, and thereby distinguishing it from a mere case of bailment or pledge. (38 Md., 253-4.) *Palmer vs. Merrill*, 6 Cush., 282.

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Webb was the agent of the company, and "public policy" prohibits any such dealings as in this case between policy-holders and companies or their agents. If there were anything in this argument, the Court would have considered it in the former case. The transaction, however, between Webb and the Dungans was a purely personal and private one, and not in his capacity of agent, and with which the company had nothing to do. It is not true that the company lent Webb the money which he loaned the Dungans, or that he was the agent of the company in making said loan. The company *some time afterwards* lent Webb some money upon a number of collaterals, of which this policy, then the property of Webb, happened to be one, and which loan Webb subsequently repaid, receiving back his collaterals, including this policy. Webb was the agent of the company only for the purpose of receiving applications for insurance and payment of premiums. His statements and conversations in reference to his private transactions with the Dungans, therefore, do not concern the company any more than the transactions themselves. The company cannot be affected by representations of its agent in regard to matters outside of the scope of his agency. This rules out all conversations between Webb and H. S. Dungan or Lipscomb in regard to his (Webb's) relation to the policy—which are the subject of appellee's exception in the Court below.

It is further argued, and this seems to be the gist of the appellant's case, that in the interval between June 17th, 1862, and the date of the surrender of the policy, Webb made false and contradictory statements in reference to the policy. This Webb denies. The fact, however, is wholly immaterial. Webb's conversations and statements, made with reference to his own private transactions with the Dungans, can in no way affect the company, and if made with reference to the condition of the policy, or other matters within the scope of his agency, the Dungans, as

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shown by the testimony of H. G. Dungan and Lipscomb, his attorney, were in no way misled or damnified by them. They did not trust Webb, and they were fully and truthfully informed at the company's office at Newark, and by its highest officer, of all matters relating to the policy. Besides, they knew all along of their own knowledge: 1st, That the policy was legally Webb's, having been assigned to him for a debt; 2d, That Webb had never been repaid his debt, principal or interest; 3d, That for several years they had paid no premiums, and that if the policy was alive, it was kept alive by further advances on Webb's part; 4th, and lastly, They knew, as already stated, upon the best authority (that of the company's books and president, at Newark,) that the policy was in force. It would seem impossible for the most fertile fancy to distort these facts into a case of fraud or concealment against the company.

The present proceeding is a *bill to redeem, AND to recover the amount of the policy!* Webb, as the assignee of the policy, was under no obligation to pay premiums, or to keep the policy alive for a single year. He had a perfect right, if he pleased, to let it lapse and become forfeited, by non-payment of premiums, and so let it expire on his hands, or he had, as incidental to his legal rights and ownership, as assignee, the right to surrender it to the company, and so re-imburse himself for his advances. The Dungans, when they assigned the policy to Webb, took the risk therefore, 1st, of his letting it die, (if they did not pay the premiums;) 2nd, of his surrendering it. If they wished to redeem, it was incumbent upon them to exercise their right to do so, "within a reasonable time," "with due diligence," and before either of these contingencies, fatal to the further existence of the policy, should happen. The Dungans assigned June 17th, 1862. Default was made in the payment of the note for which it was assigned in October, 1862. The right to redeem is

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for the first time asserted in the present proceedings, by bill filed November 10th, 1873, by the administratrix of Mrs. Dungan, eight years after the surrender of the policy, and after both the Dungans were dead. It comes too late. Such an exercise of the right to redeem is barred, if not by Statute of Limitations, by lapse of time. *Wilhelm vs. Caylor*, 32 Md., 152; *Angell on Limitations*, secs. 26, 27; 2 *Story Eq. Juris.*, sec. 1520; see also *Ib.*, sec. 1031; *Penny vs. Brice*, 18 C. B. N. S., 396-7, (114 E. C. L.); *Harwood vs. R. R. Co.*, 17 Wall., 81; *Marsh vs. Whitmore*, 21 Wall., 185; *Wilson vs. Brannon*, 27 Calif., 258, 270.

Not only was no offer to redeem made, nor any right to redeem set up by the Dungans in their life-time, but in 1866, by the institution of an action of trover against the company, they made election of a totally *different and inconsistent* remedy, thereby waiving all claim or pretence to any subsequent right to redeem, or any purpose to do so. This ought to be sufficient to preclude the appellant's present proceeding. *Blackett vs. Bates*, 1 L. R. Chy. App., 117-126, and cases *ut supra*.

Even if the surrender and cancellation of the policy in November, 1865, after notice and with full knowledge on the part of the Dungans, did not put an end to the policy so far as they and their rights were concerned, and if the Court should hold that the company took the surrender, subject to the same equities, whatever they might be, which the Dungans had while the policy continued in the possession of Webb, still, to keep the policy alive until the death of F. D. Dungan, in 1870, *payment or tender of premiums by somebody* was necessary. Webb paid the premiums in 1863, 1864, 1865. Francis D. Dungan did not die until 1870. No premiums were paid or tendered by anybody after June 17th, 1865. The policy, therefore, lapsed and ceased to exist after June 17th, 1866, according to its terms and conditions, by reason of such non-pay-

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ment, and with it all interest of the Dungans therein fell to the ground. The administratrix of Mrs. Dungan cannot maintain a bill to *redeem* what had no existence as property in the life-time of her intestate, and in which her intestate had ceased to have any interest years before her death. Nor can this Court presume in favor of the administratrix, that her intestate would have been able or willing to pay premiums from 1866 to 1870. To pay or not to pay was the election of the living. It cannot be claimed by the administratrix after her death. *Want vs. Blunt*, 12 *East*, 183; *Simpson vs. Accidental Death Ins. Co.*, 2 *C. B. N. S.*, 257, (89 *E. C. L.*); *Pitchard vs. Merchants' Mutual L. I. Co.*, 3 *C. B. N. S.*, 662, (91 *E. C. L.*); *Accey vs. Fernie*, 7 *Mees. & Welsby*, 151; *Busby vs. North America L. I. Co.*, 40 *Md.*, 572, 582-3; *Mutual Benefit Life Ins. Co. vs. French*, 4 *Bigelow*, 373; *Mutual Benefit Life Ins. Co. vs. Jarvis*, 22 *Conn.*, 133; *Williams vs. Washington L. I. Co.*, 4 *Bigelow*, 57; *S. C.*, 31 *Iowa*, 544; *Howell vs. Knickerbocker Life Ins. Co.*, 1 *Bigelow*, 580; *S. C.*, 44 *N. Y.*, 276; *Ruse vs. Mutual Benefit Life Ins. Co.*, 23 *N. Y.*, 516; *Mutual Benefit Life L. I. Co. vs. Ruse*, 1 *Bigelow*, 83, and note; *S. C.*, 8 *Georgia*, 534; *Roberts vs. N. E. Mut. Life Ins. Co.*, 2 *Bigelow*, 143, 147; 2 *Disney*, 106; *Robert vs. N. E. Mut. Life Ins. Co.*, 1 *Bigelow*, 640; 1 *Disney*, 355; *Pitt vs. Berkshire Life Ins. Co.*, 100 *Mass.*, 500; *Nightingale vs. State Mut. Life Ins. Co.*, 5 *R. I.*, 38; *Dillard vs. Manhattan Ins. Co.*, 44 *Geo.*, 119; *Tait vs. N. Y. Life Ins. Co.*, 4 *Bigelow*, 479, 484-5-6-7.

There is nothing in the visit of inquiry paid by H. G. Dungan to the company's office, in May, 1866, to militate against the application of this rule. It was a visit of inquiry solely. There was no tender in fact, and no pretence of present ability or readiness to make tender. None of the cases, which decide that under some circumstances, the necessity for *actual* tender may be dispensed with, go so far as to say that *the ability and readiness to make*

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tender, as well as the fact of tender itself, may be dispensed with. Neither would tender of any amount *then due*, (May, 1866,) have covered the case of premiums yet to accrue for the next three years. Yet, without payment or tender of such premiums, already stated, the policy ceased to exist. 5 *Robinson Pr.*, 943-4; *Glasscott vs. Day*, 5 *Esp.*, 48; *Kraus vs. Arnold*, 7 *J. B. Moore*, 59, (17 *E. C. L.*, 71;) *Lewis vs. Mott*, 9 *Tiffany*, 396-402; *Bakeman vs. Pooler*, 15 *Wend.*, 637.

ALVEY, J., delivered the opinion of the Court.

We have had this controversy before us on a former occasion. It was then in the form of an action of trover for the alleged conversion of the policy of insurance, 38 *Md.*, 242. That action resulted adversely to the plaintiff; and immediately upon the decision of that case, the present bill was filed.

In the former case, this Court decided that the assignment of the policy by Dungan and wife to Webb was not a pledge, and that, consequently, they had not at the time of the alleged conversion and suit brought, the interest and title of bailors, so as to enable them to maintain an action of trover for the conversion of the policy. We expressly refrained, however, from intimating any opinion as to the rights and liabilities of the parties in a different form of action or proceeding.

The policy of insurance on the life of Francis D. Dungan was issued by the defendants on the 17th of June, 1861, to and for the benefit of Mrs. Elizabeth W. Dungan, the wife of the said Francis D., for the sum of \$5,000; and which policy contains an express agreement on the part of the defendants that, in consideration of the representations made in the application, and of the sum of \$245 to them paid by the assured, and of the like sum to be annually paid on the particular day mentioned, during the continuance of the policy, they would well and truly pay or cause to be



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paid, "the said sum insured to the said Elizabeth W. Dungan, or *assigns*, within ninety days after due notice and proof of the death of the said Francis D. Dungan." It was also expressly stipulated that in the event of non-payment of any premium on the day named for its payment, the policy, with all previous payments thereon, and also all interest in profits, should be forfeited to the company. This policy appears to have been issued upon the cancellation of a policy issued by the defendants in 1852, on the life of Francis D. Dungan, for the benefit of a former wife, for \$5,000, and which policy was kept alive by the regular payment of premiums until it was cancelled, and the policy of the 17th of June, 1861, substituted in its stead. At the time of issuing this latter policy William P. Webb was the agent of the defendants in Baltimore, and through whom the policy was obtained. For the purpose of paying the cash part of the premium due on the 17th of June, 1862, Webb, the agent, loaned Dungan and wife the money, and took their note at four months, for \$220.25. The cash part of the premium was then paid, and a note given for the residue; and this was the last premium that was ever paid by either Dungan or his wife. Webb, at the time of taking the note for the money loaned, took an assignment of the policy, under the hands and seals of Dungan and his wife, and which assignment is as follows: "For value received, we do hereby assign, transfer and set over unto Wm. P. Webb, his heirs or assigns, the above named policy of insurance, and all sum or sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise, or to be had or made by virtue thereof, to have and to hold unto the said Wm. P. Webb, his heirs or assigns." And at time of the making of this assignment, Webb executed the following receipt and defeasance: "Received of Mrs. E. W. Dungan and Mr. F. D. Dungan, assignment of policy No. 9238, in the Mutual Benefit Life Insurance Company

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of N. J., life of F. D. Dungan, *as security for the prompt payment at maturity of their note, at four months from date, amounting to two hundred and twenty  $\frac{1}{10}$ % dollars; said assignment to be null and void upon the payment of said note at its maturity, otherwise to continue for sole use of Wm. P. Webb.*" These papers all bear date the 17th of June, 1862.

The note given to Webb was not paid at maturity, and, indeed, has never been paid, and consequently the policy was not redeemed; and Webb, as assignee, paid the premiums as they fell due in 1863, 1864 and 1865; and on the 28th of November, 1865, he surrendered the policy to the company, for which he received its reserve value, amounting at that time to \$1,248.51. Mrs. Dungan, the assured, died in August, 1868, and Mr. Dungan, upon whose life the policy was taken, died in April, 1870. Mrs. Dungan died intestate, and letters of administration upon her estate were not obtained by the plaintiff until December, 1871.

The present application proceeds upon the theory that the assignment and receipt or defeasance before cited, when taken together, constitute a mortgage to secure the payment of the note for \$220.25, and that there has been no such foreclosure as to preclude the plaintiff the right to redeem the policy, and, under the peculiar circumstances of the case, to recover the amount of the insurance as if the policy subsisted in full force at the death of Francis D. Dungan; and, accordingly, the plaintiff not only seeks to redeem the policy, but to recover the amount thereof, less the amount of unpaid premiums and interest, due the company, and the amount of the note with interest due Webb, together with the premiums paid by him while he held the policy as assignee. This claim of the plaintiff is controverted by the defendants in all the aspects in which it has been presented; and there has been considerable evidence adduced to show the circumstances of the transac-

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tion, and the manner in which the parties concerned dealt with each other in regard to the policy after it was assigned to Webb. This evidence is, in some material particulars, conflicting; but it gives rise to questions of the want of good faith and fair dealing on the part of Webb and the defendants, in respect to the right of the assured to redeem the policy while held by Webb, and before its surrender to the company.

We have held in the former case that the assignment and the receipt or defeasance are to be taken together as the evidence of the contract between the parties, and the character of that contract is to be determined from the manifest intention of the parties thus evidenced. Any agreement in the assignment, or in the separate instrument, showing that the parties intended the assignment to operate as a security for the repayment of money, is all that is necessary to make it a mortgage, and such an agreement is plainly apparent on the face of the defeasance before recited; and when it is once ascertained that the assignment is to be considered and treated as a mortgage, then all the consequences appertaining in equity to a mortgage must be strictly observed, and the right of redemption is regarded as an inseparable incident. *Jaques vs. Weeks*, 7 *Watts*, 261. And, as a general proposition, an agreement, at the time of the loan, to purchase or take the estate at a given price, in case of default, is not permitted to interfere with the right of redemption; the Court looking at the real contract, which is but a security for the debt, treats the time mentioned for redemption as only a formal part of the instrument, and thus makes the general intention override the words of the particular stipulation. *Hipwell vs. Knight*, 1 *Y. & Coll. Ex. Cas.*, 415, 416. Indeed it may be stated as a rule never to be transgressed, that a mortgagor cannot, by any contract entered into with the mortgagee at the time of the mortgage, give up his right of redemption, or fetter it in any manner by confin-

ing it to a particular time, or to a particular description of persons. This proposition is abundantly supported by decided cases, which are collected in the notes to the leading case of *Howard vs. Harris*, 3 *Eq. L. Cas.*, 605, 606, and 625, 6-7. It is clear, therefore, that, notwithstanding the express terms of the defeasance, that in default of payment of the note at maturity, the policy was to continue for the sole use of the mortgagee, the right of redemption was not thereby defeated after the day of payment.

Policies of insurance on life, as well as stocks and personal annuities, are not only assignable but proper subjects of mortgage; and if accompanied by an actual transfer, the mortgagee may, after default and due notice to the mortgagor to redeem, proceed to sell, without the trouble and delay of bringing a bill to foreclose; and in such case the title, if the sale be *bona fide* made, will vest absolutely in the vendee. *Dyson vs. Morris*, 1 *Hare*, 413, 425; *Tucker vs. Wilson*, 1 *P. Wms.*, 261; *Hart vs. Ten Eyck*, 2 *John. Ch. R.*, 100; 2 *Sto. Eq. Jur.*, sec. 1031. But in case of a mortgage, or assignment of a policy of life insurance as collateral security for a debt, with right of redemption, the assured is not relieved from the obligation to pay the premiums in order to keep the policy alive, according to the requirement of the contract of insurance, unless it be by some arrangement between the company and the mortgagee; nor is the mortgagee bound, in the absence of some agreement with the mortgagor to that effect, to keep the policy alive and subsisting, by the payment of the premiums as they may accrue due. He may be prompted by his interest to keep the security alive and in an available condition; but if he pays the premiums while he is the holder of the policy, he pays them on the faith of the policy as a security for reimbursement; but such payment in no way changes the nature of the security itself,—that is to say, such payment in no manner destroys the right of redemption.

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Here the right of redemption is insisted upon, and it is not pretended that the assured was, by any arrangement or agreement, relieved from the payment of the premiums as required by the terms of the policy. Webb did not assume to pay the premiums while holding the policy as mere collateral security. He accepted the assignment simply as security for the payment of the note which matured at four months from its date, and within the time which the policy would subsist by reason of the last premium paid. Upon what principle, then, can the present claim be maintained,—the assured herself having failed to pay the premiums after the 17th of June, 1862, and there being no premiums paid by any one after the 17th of June, 1865.

There seems to be a want of harmony in the authorities as to the real and true nature of the contract of insurance, such as that contained in the policy before us. By some it is maintained, and with great show of reason, that the insured, upon the payment of the first premium, effects an insurance upon the particular life only for one year, or until the next premium day, and purchases a right to continue that insurance from year to year, during the life insured, at the same rate, leaving it optional with the assured whether to renew or continue the policy or not, and thus making the payment of the premiums a condition precedent to any subsequent liability on the part of the insurers. This view of the subject is strongly maintained by the Supreme Court of Connecticut, in the recent case of *Worthington vs. The Charter Oak Life Ins. Co.*, 41 Conn., 372. While on the other hand, a majority of the Supreme Court of the United States have held, in the case of *The New York Life Ins. Co. vs. Statham*, 3 Otto, 24, that the contract is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums, and thus the payment of the premiums is made a condition subsequent. But, according to either view of the subject, it is certainly true that

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exactness and promptitude of payment are all-important to the success of the business of life insurance companies. Without promptness in the payment of premiums all the calculations of the company are liable to be deranged and disappointed. This would work detriment and loss not only to the company but to its policy-holders generally; and nothing would more certainly destroy all confidence in the company than an understanding that parties dealing with it were not required to observe with strictness the terms of their contracts. Such strict observance is essential to the very nature of the business, and it is the general understanding that time is of the essence of the contract.

From this view of the requirements of the contract, it is clear that, in order to maintain the position of the plaintiff in this case, it is necessary to show by satisfactory evidence, that the assured, while it is admitted she did not pay the premiums, did that which was equivalent to actual payment; that is to say, that she tendered payment of them as they became due. But in this we think the plaintiff has failed.

The evidence of the tender of the premiums due the 17th of June, 1863, is not in all respects satisfactory; and it is explicitly denied by Webb, the agent. But, conceding the tender to have been then made to Webb, the defendant's agent, as contended by the plaintiff, it becomes immaterial in the present aspect of the case, inasmuch as Webb, as assignee, did, in fact pay the premium, and continued to pay it for the years 1864 and 1865, and thus kept the policy alive, subject to the right of redemption, upon payment of the mortgage debt, and the premiums advanced for the preservation of the security. It is not pretended that there was any tender of the mortgage debt to Webb at that time, or at any subsequent time. Indeed, the witness admits that he did not know at the time that the policy had been assigned to Webb, or

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that he had any claim to hold it. So if the premium then due had been received from the witness it would only have relieved Webb from the necessity of advancing the premium, and not in any manner restored the policy to the control of the assured.

After young Dungan's interview with Webb in June 1863, there was no further steps taken on the part of the assured in reference to the policy until September 1865, when, distrusting the representations of Webb as to what had been done with the policy, inquiry was made in regard to the matter at the home office of the defendants. At that time the policy was still alive and subsisting, and would so continue until June 17th, 1866. And the assured was so informed by the officers of the defendants. The correspondence that ensued, and before the policy was surrendered by Webb, between the attorney of the assured and the president of the insurance company, had reference to the claim and demand of Webb,—the defendants at the time having no interest in the policy other than mere insurers. Mr. Grover, the president, by his letter of the 6th of November 1865, informed Mrs. Dungan's attorney of the claim of Webb, and the terms upon which he, Webb, was willing to re-transfer the policy. The president did not, in that letter, profess to be acting in the interest of the company, but only as he was authorized to speak for Webb as the holder of the policy. It was not until December 12th, 1865, that the president of the company communicated the fact that the policy had been surrendered by Webb; the surrender having been made on the 28th of November 1865. In all this correspondence and negotiation there was no tender or offer to pay either the amount claimed by Webb, which was excessive, or the amount actually and fairly due on account of the note, and money advanced for premiums. And it was not until May, 1866, that young Dungan, according to his testimony, went to the office of the defendants in Newark, and

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there saw the vice-president of the company, and told him that he, the witness, had come prepared to pay the amount the company had named to the attorneys, and to which the vice-president replied that the policy had been surrendered and was ended. This statement of the witness is contradicted in the testimony of Miller, the vice-president; but conceding it to be true, the witness admits that he had not the money with him, but states that he had made arrangements for it, and would have got it in New York, and then sent it on from Baltimore. What the arrangements were, with what degree of certainty he expected to receive the money, and how and at what time it was to be sent from Baltimore, the witness has not informed us. Now it is hardly necessary to cite authorities to show that this transaction did not amount to a tender. In 2 *Greenleaf's Ev.*, sec. 603, it is laid down as the settled law, supported by many authorities, that "The *production* of the money is *dispensed with*, if the party is ready and willing to pay the sum, and is about to produce it, but is prevented by the creditor's declaring that he will not receive it. But his bare refusal to receive the sum proposed, and demanding more, is not alone sufficient to excuse an actual tender. The money or other thing must be *actually at hand*, and ready to be produced immediately, if it should be accepted; as, for example, if it be in the next room or up stairs; for if it be a mile off, or can be borrowed and produced in five minutes, or, being a bank check, it be not yet actually drawn, it is not sufficient." And in the recent case of *Talty vs. The Freedman's Saving & Trust Co.* in the Supreme Court of the United States, (3 *Otto*, 325,) where the question was fully considered as to what constitutes sufficient tender, in a case of a voucher pledged as collateral security, and which had been transferred by the pledgee, it was held, that a simple offer by the pledgor, unattended with any tender of the amount due, was insufficient; that an offer to pay is not the equivalent for an actual tender.



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In this case, after the occasion just mentioned, there was no other attempt to make tender either of premiums or the amount due Webb. And as the punctual payment of the premiums was an essential condition to the life of the policy, and the question whether the policy should be kept in force or allowed to lapse, being entirely at the option of the assured, or her assignee, there is no principle upon which the claim to redeem and enforce the policy, as if in force at the death of the life insured, can be sustained. The company could not be made to bear the risk without consideration. *Want vs. Blunt*, 12 East, 183; *Simpson vs. Accidental Death Ins. Co.*, 2 C. B. (N. S.) 257; *Pritchard vs. Merchants' & Tradesmen's Mut. Life Ins. Society*, 3 C. B. (N. S.) 662.

But, notwithstanding we decide that the present bill cannot be sustained for the redemption and collection of the policy, as if in force, we think that, under the facts and circumstances of this case, there is an equity to which the plaintiff is entitled.

Webb holding the policy as mortgagee, held it subject to the right of redemption, provided the right was exercised within a reasonable time. He could only sell the policy after giving due notice to the assured to redeem, and while we think it was perfectly competent for him to surrender the policy to the company either for its reserve or equitable value, as an advantageous mode of sale and foreclosure, yet it was necessary that notice should have been given to redeem before the surrender took place; and the party purchasing, or the company accepting the surrender, without such notice, would only acquire the interest of the mortgagee, and hold subject to the right of redemption, as the mortgagee held before the sale or surrender.

Now, there is no pretence that any notice was given to redeem before the surrender of the policy. On the contrary, Webb seems to have proceeded as if he were the absolute owner, and in utter disregard of the right of

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redemption. Moreover, his misrepresentations made, first to young Dungan, in June 1863, and again to Lipscomb, the attorney, in September, 1865, were well calculated to mislead and deceive the parties. Webb, it is true, denies making the representations sworn to by the two witnesses named; but they so distinctly corroborate each other in regard to the statements made by Webb, as to what had been done with the policy, that we cannot do otherwise than accept their evidence as reliable. He stated to these witnesses emphatically that the policy had been surrendered and was dead; that it was out of his control and no longer available; and that the only way the matter could be fixed was to have a re-examination of Francis D. Dungan for a new policy; a thing known to all parties to be then impracticable, owing to the declining and feeble state of Mr. Dungan's health. These statements by Webb in regard to the policy were without foundation in fact, for at the time they were made the policy had not been surrendered, but was then in his control, and in full force.

It is contended for the defendants that they should in no manner be affected by Webb's misstatements in regard to the policy before its surrender. But we do not assent to this. Whatever Webb may have done that would create a right or an equity in respect to the policy, as against himself, will, under the circumstances of this case, affect the defendants, who claim to hold under him, and by virtue of his supposed right to surrender the policy. But the defendants took the policy with express notice of the adverse claim of the assured. They knew that the matter was in dispute between Webb and the assured; and it would appear that it was with a view of aiding and assisting Webb in his contention that the surrender was effected. Webb states in his testimony that he surrendered the policy in obedience to the desire of the company, and the president of the company admits that he made suggestions to Webb, as to the impropriety or impracticability of con-

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tinuing the policy for his own benefit, that may have determined him, Webb, to surrender it ; and in his letter of the 27th of November 1865, the president offered Webb strong inducements to that course.

In view of these facts, we are compelled to say that there is an apparent want of good faith in the matter. The utmost candor and good faith were required, not less on the part of the company, its officers and agents, than the assured ; and not only in the inception of the contract, but in all subsequent dealings in respect to it. The policy is exceedingly questionable that gives sanction to any such dealing as that here disclosed between the insurance company and its agent. At any rate, in such case, all the intendments should be made against the company, and in favor of the assured, who may have been prejudiced by the conduct of the agent, sanctioned and adopted by the company, as in the present instance.

Upon the whole, we think it but just to declare that the right of redemption continued to exist at the time of the surrender of the policy, and that the surrender should be regarded as having been made on the joint account of Webb and the assured, according to their respective interests ; that is to say, on account of Webb to the extent of the interest secured by the assignment of the policy, including premiums paid, and on account of Mrs. Dungan, the assured, for the residue of the reserve value which the defendant agreed to allow Webb.

The defences relied on by the defendants, of the bar of the Statute of Limitations, and lapse of time, we think should not prevail. The Statute of Limitations as a positive bar has no application to a case like this ; and as to the lapse of time, the circumstances of the case afford full explanation of that. In a case of this nature, under ordinary circumstances, such length of time as has been allowed to elapse in this case, before bill filed, would show such laches as to preclude relief. The principle of the case of *Lockwood vs.*

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*Ewer*, 2 *Atk.*, 303, and many other subsequent cases, would apply and be controlling. But each case depends, more or less, upon its own special circumstances; and here Mrs. Dungan was a *fême covert* from the date of the policy to the time of her death in 1868, and Mr. Dungan, her husband, was, for several years immediately preceding his death in 1870, utterly unable to attend to business by reason of his mental condition. There has been, however, no acquiescence in the claim of either Webb or the defendant in respect to the policy; for in 1866 an action of trover was brought by Dungan and wife against the defendant for the alleged tortious conversion of the policy, and that action was not finally determined until 1873. And although that action was misconceived, yet it was notice to the defendant of the adverse claim of the assured, and there is nothing in the case to show that the defendant has been in any manner prejudiced by the delay.

We shall reverse the decree appealed from and remand the cause, that an account may be taken, if necessary, upon the principle that the defendants are to be charged with the reserve value of the policy at the time of its surrender, that is to say, \$1248.51, and be credited with the amount due Webb at the time of the surrender on account of the note, and premiums advanced, with interest to that date; the balance, with interest, to be decreed to the plaintiff, with costs.

*Decree reversed, and  
cause remanded.*

(Decided 8th May, 1877.)

VESPASIAN H. WATTS *vs.* THE PRESIDENT AND COMMISSIONERS OF THE VILLAGE OF PORT DEPOSIT.

*Mandamus—Appeal—Municipal Corporations—Effect of a change of name during the pendency of an action against—Effect of Amendment and re-enactment of the sections in the Code—Construction of the Act of 1876, ch. 367, relating to the levy by taxation of sums to pay judgments against Municipal Corporations.*

Applications for mandamus and the proceedings therein, are conducted upon the law side of the Court and not in equity.

To warrant an appeal there must therefore be a final judgment in favor of the petitioner, granting the writ, or a final judgment in favor of the defendant, and dismissing the petition.

By sec. 141 of the Code of Public Local Laws, Art. 8, it is declared, that "the Citizens of the Village of Port Deposit in Cecil County, are a body politic by the name of The President and Commissioners of the Village of Port Deposit, and as such may sue and be sued," &c.; then follow a number of sections defining the powers and duties of said municipal corporation. By the Act of 1872, ch. 347, these sections are *amended* and *re-enacted*, and by said amendment, it is provided that "the inhabitants of the Town of Port Deposit in Cecil County, are a Corporation by the name of President and Commissioners of Port Deposit, and by that name shall have perpetual succession, sue and be sued," &c. This Act contained no clause *expressly repealing* the sections of the Code above referred to. HELD:

That the Act of 1872, effected no change in the corporate existence of the municipality, and that a judgment rendered in December, 1874, in a suit instituted against it prior to said Act by its old name was a valid judgment.

The Act of 1872, after conferring powers upon the said corporation to carry out which would render taxation necessary provides, that the President and Commissioners "shall have power to levy and collect taxes in said town, not exceeding in any one year thirty cents in the one hundred dollars on the assessable property of said town." The Act of 1876, ch. 367, provides that "any municipal corporation in this State against which there is a judgment

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in any Court of law in this State, shall have power to levy a sum of money upon the assessable property of such municipality sufficient to pay such judgments." **HELD:**

1st. That the said Act of 1876, applies to the corporation and judgment above mentioned.

2nd. That the power given by the original charter and by the Act of 1872, to levy a tax not exceeding thirty cents in the hundred dollars, was a power of taxation for the general purposes intended to be provided for by those laws, and was not inconsistent with a special authority conferred by the subsequent Act to levy more when required for a particular occasion.

**APPEAL** from the Circuit Court for Cecil County.

The case is stated in the opinion of the Court.

The cause was submitted to **BARTOL, C. J., BRENT, MILLER** and **ROBINSON, J.**

*Albert Constable* and *Hiram McCullough*, for the appellant.

*W. J. Jones* and *Alexander Evans*, for the appellees.

**MILLER, J.**, delivered the opinion of the Court.

This appeal must be dismissed because the record does not show any final judgment of the Court below, in the matter pending before it, which alone will authorize an appeal in such cases. It appears a petition for a *mandamus* was filed by the appellant, and to this, after the usual order, the appellees filed an answer. The petitioner then moved to quash this answer and for a peremptory *mandamus*, and this motion on being argued and submitted was overruled by the Court. The petitioner then filed a demurrer to the answer, which the Court overruled with costs, and then as the record states, the petitioner on the same day prayed an appeal, which was granted. Applications for *mandamus* and the proceedings thereon are conducted upon the law

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side of the Court, and are treated as proceedings at law and not in equity. To warrant an appeal there must therefore be a final judgment, in favor of the petitioner granting the writ, or a final judgment in favor of the defendant and dismissing the petition. No such final judgment appears in this case to have followed the overruling of the demurrer to the answer, and hence the appeal must be dismissed. But such a judgment can be obtained and an appeal will then lie, and inasmuch as the merits of the case have been fully argued, and as we have no doubt upon the questions involved, we shall proceed to dispose of them, in order to save the parties the costs and expense of another appeal.

It appears from the petition and answer that the appellant, on the 9th of September, 1871, brought an action at law against "The President and Commissioners of the Village of Port Deposit." The declaration in that suit was filed on the 2nd of December, 1873, and after the usual pleas and a jury trial, the result was a verdict and judgment against the corporation sued, in favor of the plaintiff for \$499.99, rendered on the 19th of December, 1874. The present petition, which was filed on the 21st of September, 1876, asks for a *mandamus* against the appellees, commanding and directing them to make a special levy, on the assessable property of the town of Port Deposit, sufficient to satisfy this judgment and costs. This is resisted by the appellees upon two grounds, in substance as follows :

1st. Because during the pendency of the suit at law, the Act of 1872, ch. 347, was passed and went into effect, by means of which, there was such a change made in the corporation and its corporate name, as to render the judgment inoperative and void, and make it in effect a judgment against a corporation which had ceased to exist.

2nd. Because the appellees have no legal authority to levy a tax, to pay the judgment rendered against the corporation.

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1st. As to the first objection. By section 141 of the Code of Public Local Laws (Art. 8,) it is declared that "the citizens of the Village of Port Deposit, in Cecil County, are a body politic by the name of The President and Commissioners of the Village of Port Deposit, and as such may sue and be sued," &c., and then follow a number of sections defining the powers and duties of this municipal corporation. By the Act of 1872, ch. 347, these sections "are amended and re-enacted so as to read as follows:" By this amendment it is provided that "the inhabitants of the Town of Port Deposit, in Cecil County, are a corporation by the name of President and Commissioners of Port Deposit, and by that name shall have perpetual succession, may sue and be sued," &c. Now it is contended that as the suit was against the corporation by the name first given to it, and was prosecuted to judgment in that name, and as there is no saving clause in the Act of 1872, this amendatory law wholly made void the corporate powers of the defendant sued, and the judgment was in fact entered against a corporation which had ceased to exist, and could not therefore be enforced against the present corporation under its present corporate name. But we cannot yield assent to this proposition. In the case of *Dashiell vs. The Mayor & C. C. of Balto.*, 45 Md., 615, we had occasion to consider the effect upon existing powers, rights and obligations of statutes enacted under the provisions of our State Constitution, repealing and re-enacting, or amending and re-enacting former laws, without any saving clause as to such rights and powers, and we there held, that where the subsequent law re-enacted substantially the same provisions as those contained in the original Act, the continuity, as to those provisions of the original law was not interrupted. The danger and difficulties that would result from any other construction, was there dwelt upon and need not be repeated. Here it may be noticed that the Act of 1872, contains no clause ex-



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*pressly repealing* the sections of the Code referred to. It simply amends and re-enacts them, and in so doing makes no substantial change, as to the point we are now considering, either in the corporation itself or in its corporate name. "A charter may be amended, and the name of the place and the *governing body may be changed*, and its boundaries altered, while in law the *corporation remains the same*. The insertion in an amended charter of the same provisions that were contained in the old is not, unless such upon the whole, appears to have been the intention of the Legislature a repeal of the latter. The law on this subject is thus stated: Where a statute does not in express terms annul a right or power given to a corporation by a former Act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent Act does not annul the rights and powers under the former Act and under its former name, there being no express repeal." *Dillon on Municipal Corp.*, secs. 52, 115. In view of these authorities it seems to us, that in law, the same corporation that was sued, and against which the judgment was rendered, is now resisting its enforcement. There is therefore no force in this objection.

2nd. Nor do we think the second ground of defence can be sustained. The Act of 1872, after conferring powers upon the corporation, to carry out which would render taxation necessary, provides, that the President and Commissioners "shall have power to levy and collect taxes in said town, not exceeding in any one year, thirty cents in the one hundred dollars, on the assessable property of said town; and shall also, for the purpose of grading and paving the streets of said town, have power to levy such other taxes upon the property fronting on the street or portion thereof to be paved, as will pay the cost of grading and paving the same." Now assuming that upon the facts stated in the answer, the appellant would have no right to a *mandamus* if this were the only law on the subject,

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we are of opinion all difficulties in the way of such remedy is removed by the Act of 1876, ch. 367, which went into effect on the 8th of April, 1876, and which provides that "any municipal corporation in this State, against which there is a judgment in any Court of law in this State, shall have power to levy a sum of money upon the assessable property of such municipality, sufficient to pay such judgments." We fully agree with the appellant's counsel in the construction they have placed upon this statute. It applies to this corporation and to this judgment. The general power given by the original charter and by the Act of 1872, to levy a tax not exceeding thirty cents in the hundred dollars, is a power of taxation for the general purposes intended to be provided for by those laws, and is not inconsistent with a special authority conferred by the subsequent Act to levy those when required for a particular occasion. This law says, the corporation shall have power to levy a sum *sufficient* to pay the judgment, and that means that if a levy of thirty cents in the hundred dollars will not suffice, then that more than thirty cents may be levied, otherwise there is no meaning in the language used.

Entertaining these views we should reverse the ruling on the demurrer, and remand the case in order that the *mandamus* might be issued, if there had been a final judgment authorizing an appeal. But as the second fails to disclose such a judgment the appeal must, as we have said, be dismissed.

*Appeal dismissed.*

(Decided 13th June, 1877.)

ABRAHAM SHERTZER *vs.* THE MUTUAL FIRE INSURANCE COMPANY OF HARFORD COUNTY.

*Demurrer—Pleading—Action on a policy of insurance to recover for loss of goods by fire—Question whether an action of covenant would lie, the terms of the policy having been materially altered by an agreement not under seal.*

A demurrer goes back to the first error in pleading.

The plaintiff was insured by the defendant, (a fire insurance company,) "on the contents" of a frame barn, granary and stabling situated on his land called "Widow's Care." The property so insured was destroyed by fire, and when so destroyed was not in the buildings in which it was at the time the insurance was effected, but had been removed to another part of the same tract of land which the plaintiff had subsequently purchased. The plaintiff had applied to the defendant for permission to remove the personal property described in his policy to that part of *Widow's Care*, which he had so purchased and was then in his occupancy, and the defendant granted him that privilege and right to, and *endorsed said permission upon said policy*, and in pursuance of said permission the removal was made. The endorsement of said permission was signed by the secretary of the company, *but was not under seal*, and was in these terms: "Permission is hereby granted to assured to remove the personal property insured within to the property now occupied by him, and insured to J. S. by policy No. 832." One of the conditions annexed to and made a part of the plaintiff's policy, provided that "insurance on contents of buildings shall be taken to include every species of personal property therein." The plaintiff having sued the company *in covenant* to recover for the loss, on demurrer **Held:**

- 1st. That the risk which the policy covered as respects the property in question, continued only so long as it remained in the buildings in which it was at the time the policy was issued.
- 2nd. That the plaintiff therefore had no cause of action against the company for this loss, except by virtue of the permission endorsed upon the policy.
- 3rd. That as there was no provision in the policy authorizing the endorsement of the permission to remove the property from the original buildings,

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said endorsement was a new and distinct contract by parol upon which the action of *covenant* would not lie.

This case distinguished from that of *The Md. Fire Ins. Co. vs. Gusdorf*, 43 Md., 506.

APPEAL from the Circuit Court for Harford County.

The case is stated in the opinion of the Court.

The cause was submitted to BOWIE, BRENT, MILLER, ALVEY and ROBINSON, J.

Wm. Young, S. Archer and Henry W. Archer for the appellant.

The defendant was estopped by its consent to the removal, from setting it up as a defence to the action. *The Md. Fire Ins. Co. vs. Gusdorf*, 43 Md., 506; *The Natl. Fire Ins. Co. vs. Crane*, 16 Md., 260; *Wilkinson's Case*, 13 Wallace, 222.

Wm. G. Scott and Henry D. Farnandis, for the appellee.

On demurrer, the Court goes back to the first error in pleading. *State, use of Buckey, vs. Culler*, 18 Md., 418.

By the terms of the policy, and the 12th condition of the policy, the insurance is general, and operative only whilst the property was in the building described. *Annapolis and Elk Ridge R. R. vs. Balto. Fire Ins. Co.*, 32 Md., 37; *Md. Fire Ins. Co. vs. Gusdorf*, 43 Md., 506.

The endorsement of permission is not in pursuance of any provision of the policy, and cannot be construed or sued on as part of the original contract.

In this respect it differs from the case of *Balto. Fire Ins. Co. vs. McGowan*, 16 Md., 47; *Md. Fire Ins. Co. vs. Gusdorf*, 43 Md., 506.

The endorsement, if it have any force, must be treated as a new contract, and not being under seal, must be sued

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on in assumpsit. *Mutual Fire Ins. Co., &c., vs. Deale*, 18 Md., 26; *Rathbone vs. City Fire Ins. Co.*, 31 Conn., 193.

MILLER, J., delivered the opinion of the Court.

A practice which cannot be too highly commended, of waving by agreement, all errors in pleading, has been gradually growing in favor with the profession in this State, and has prevailed especially in suits upon policies of insurance. In this case, however, it is purely a question of pleading that we have to decide. The action is in *covenant*, the policy being under seal. The defendant, after craving *oyer*, pleaded four pleas, to the first of which the plaintiff replied and issue was joined upon each of the others. The defendant demurred to the replication, and the demurrer being sustained, the plaintiff, without trial of the issues, suffered judgment in favor of the defendant to be entered on the demurrer, and from that judgment has appealed. As the demurrer goes back to the declaration, we need not, in the view we have taken of the case, consider whether the replication is bad.

By the policy, dated the 28th of February, 1870, which, with its conditions and endorsements, was produced on *oyer*, the company insured the plaintiff, among other sums, to the amount of \$1000 "*on the contents of*" a frame barn, granary, and stabling (which were also insured), situated on his land, called "*Widow's Care*," in Harford County, and the suit is for loss by the destruction of this property by fire, which occurred in 1874. The declaration admits that the property, when destroyed, was not in the buildings in which it was at the time the insurance was effected, but had been removed to another part of the same tract of land which the plaintiff had subsequently purchased, and avers that on the 29th of July, 1870, the plaintiff applied to the defendant "for permission to remove the personal property described in said policy to

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that part of Widow's Care," which he had so purchased and which was then in his occupancy, "and the defendant then and there granted that privilege and right to the plaintiff and *endorsed said permission upon said policy of insurance*, and in pursuance of said permission" the removal was made. The endorsement thus made on the policy is signed by the secretary of the company, *but is not under seal*, and is in these terms: "Permission is hereby granted to assured to remove the personal property insured within to the property now occupied by him and insured to Jacob Shertzer by policy No. 832." One of the conditions annexed to and made part of the policy, provides that "insurance on contents of buildings shall be taken and construed to include every species of personal property *therein*," and from this, in connection with the terms of insurance in the body of the policy itself, it is clear the risk which this policy covered as respects the property in question, continued only so long as it remained in the buildings in which it was at the time the policy was issued. *Annapolis and Elk Ridge Railroad Co. vs. Baltimore Fire Ins. Co.*, 32 Md., 37; *Maryland Fire Ins. Co. vs. Gusdorf*, 43 Md., 506.

It follows, therefore, that the plaintiff had no cause of action against the company for this loss except by virtue of the permission thus endorsed on the policy. The declaration, in fact, sets up this endorsement and relies upon it as the means by which the insurance, which would otherwise have been ineffectual, was extended to and continued in force as to this property, after its removal, and as this permission was not granted under the seal of the company, the inquiry arises, was *covenant* the proper form of action? This question is in effect settled by the decision in *Deale's Case*, 18 Md., 51. There the policy was under seal, and there was an endorsement upon it not under seal, but simply signed by the secretary of the company, stating that an application for additional insurance had been

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granted, subject to the terms and conditions set forth in the within policy. The action was in *assumpsit* on the contract for additional insurance, and the objection there made was that it should have been in *covenant*, but the Court held that *assumpsit* and *not covenant* was the proper form, saying that "here there is nothing in the original covenant which continues it in force as a *specialty* binding the company by subsequent endorsements of additional insurance: they are new distinct contracts by parol." The Court then draw the distinction between the case before them and that of *McGowan*, in 16 Md., 47, where the policy itself provided for its *continuance* after the year, so long as the premiums were paid by the assured and accepted by the company, and where it was, therefore, held that the renewal receipt did not evidence a new contract, but an extension of the original sealed contract by virtue of its own terms, and they then cite with approval and adopt *Lucian's Case*, in 2 Whart., 167, where it was decided by C. J. GIBSON, that covenant could not be maintained upon an unsealed endorsement on a policy, to the effect that the insurance had been enlarged as to the amount and also as to the premium, because such an endorsement, not being provided for in the instrument itself, did not continue the policy as a *specialty*. So, in the case now before us, there is no provision in the policy or in any of its conditions which authorizes an endorsement like that referred to in the declaration to be made so as to continue the policy as a *specialty*, notwithstanding its conditions were about to be broken by the removal of the property from the original buildings. This endorsement, in our opinion, is clearly a new and distinct contract by parol, providing that the insurance shall be effective under circumstances which would otherwise have made the policy void. In other words, it is a parol agreement that the insurance shall continue after the removal upon the terms and conditions set forth in the policy, and forming, as it does, the

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ground of this action, and relied on in the declaration for that purpose, covenant will not lie. Nothing to the contrary of this was decided in *Gusdorf's Case*, 43 Md., 506. No question of pleading arose in that case. The action was in *assumpsit*, and all errors in pleading were waived by agreement, and the Court held that the company was *estopped* by the acts and declarations of its president from setting up as a defence to the action the fact of the removal of the goods to another building, and that permission to do so had not been endorsed in writing upon the policy according to its terms and conditions. Here the company are not attempting to deny the validity of the endorsement on which the plaintiff relies, nor its binding force upon them, but they simply say they cannot be sued on it in *covenant*, and in this, as we have shown, they are right. Taking this view of the case, it is unnecessary for us to consider other objections to the declaration presented by the argument of the appellee's counsel. This objection being fatal to the declaration, it follows that the demurrer to the replication to the defendant's first plea was well sustained, and the judgment must be affirmed.

*Judgment affirmed.*

(Decided 13th June, 1877.)



WILLIAM J. TRIPPE and WILLIAM L. STYLES, surviving obligors of WILLIAM B. CLARK *vs.* STATE, use of LUTHER C. COX and MARY H. P. COX, his Wife.

*Arrest of judgment—Irregularity—Departure in pleading—Variance between the allegata and probata—Certain objections to the pleadings in an action on a guardian's bond held to be untenable on a motion in arrest of judgment.*

No irregularity results from the length of time a suit has been pending if the parties have been duly represented in Court by their respective counsel, and the docket entries show that it is brought up by regular continuances to the Term at which it was finally tried.

A suit was brought in the year 1860, against C. and his two sureties T. and S. on a guardian's bond. Upon the suggestion of the death of the principal at May Term, 1865, it was continued against T. and S. as surviving obligors. In July, 1870, the declaration was filed together with the bond sued on. The declaration averred the execution of the bond by T. and S., and their failure to pay the amount thereof. The defendants pleaded general performance on the part of C. The plaintiff then replied setting out the names of the obligors in the bond with particularity, stating the death of C. the guardian, and assigning breaches. To this replication issue was joined, and the case was tried before a jury. Upon a motion in arrest of judgment, it was HELD:

1st. That upon the pleadings there was no ground for the objection, that the replication was a departure from the declaration by reason of its referring to a writing obligatory of two joint obligors, while the replication set out a bond by which a third party not named in the declaration was bound as principal, and they as sureties. •

2nd. That the case having been brought to an issue upon the replication, the pleadings presented a sufficient cause of action, and when the bond was offered in evidence there could have been no valid objection to it upon the ground of a difference between the *allegata* and *probata*.

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3rd. That the defendants having failed to demur to the replication, and the case having been tried upon its merits upon issue joined to the replication, the objection on the ground of a variance was not tenable upon a motion in arrest of judgment.

The condition of the bond sued on, was that the guardian should faithfully account with the Orphans' Court as directed by law for the management of the property and estate of the ward under his care, and deliver up said property agreeably to the order of said Court or the directions of law. The replication averred a failure to account, and the non-payment over of the money alleged to be due the ward. **Held:**

That this was a substantial allegation of a breach of the condition of the bond.

The replication did not allege that the ward had become of age before the suit was brought. **Held:**

1st. That demand and default to pay were alleged and this was sufficient.

2nd. That if the party had no right to sue, this could have been put in issue by the pleadings, and was the proper subject of proof, and the failure to aver that the ward had arrived at age, was not a tenable ground for objection on the motion in arrest of judgment.

3rd. That it was not necessary that suit should have been prosecuted against the guardian or his insolvency alleged before the bond became liable to an action.

### APPEAL from the Circuit Court of Talbot County.

This was an action instituted on a guardian's bond in the year 1860.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY and ROBINSON, J.

*William Shepard Bryan*, for the appellants.

The proceedings do not seem to have been very expeditious, but they were quite irregular. No attempt seems to have been made to collect from the principal the amount alleged to be due. He lived nearly five years after the suit was brought, and no steps were taken in the case; not even a *narr.* was filed. In fact, the *narr.* in the

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case was not filed until nearly ten years had elapsed from the institution of the suit; and then there is another delay of five years before the rule plea is enforced against these appellees. The record furnishes no explanation of this course of proceedings. But the result seems to have been an attempt to pass by the principal and fasten this demand on the sureties. Now, as this Court has said that the "*contract of a surety cannot be carried beyond its strict letter,*" (*Chase vs. McDonald*, 7 H. & J., 760,) the appellees intend to stand on their strict legal rights.

A guardian's bond stands on the same footing as a testamentary bond, (*Art. 93, Code, sec. 155*;) and a testamentary bond cannot be put in suit before a *non est* is returned on a summons against the executor, or insolvency or insufficiency of the estate of the executor is shown. (*Code, Art. 93, sec. 106.*) And this Court has said that this statute must be liberally construed, its design being to make the principal pay instead of the surety. *State vs. Jones*, 8 Md., 88.

Now, this condition, precedent to the surety's liability, is nowhere alleged in the case. It is a matter to be affirmatively shown by the plaintiff; and there is nothing stated from which it could be inferred by reasonable intendment. There is an entire absence of that which is a vital and essential element of the cause of action. A verdict cures a statement of facts imperfectly made; but it cannot supply a cause of action, where one does not exist. *Rush-ton vs. Aspinall*, 1 *Smith's Leading Cases*, 334, is the leading case on this subject, to which all the authorities conform, when rightly interpreted, and this shews clearly that an objection of this kind is fatal in arrest of judgment. *Gould's Pleading*, ch. 10, secs. 13, 20, 21 and 22.

The bond is in the record, and was filed at the same time with the declaration. The defendants prayed oyer, which would make it part of the declaration, if it was not so before. *Tucker vs. State*, 11 Md., 322. Then we see that

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there is a declaration against two joint obligors, when there were three, and nothing is stated in the declaration to account for the omission to join the third one. Such a declaration was declared to be bad on demurrer in *State vs. Wheeler*, 14 *Md.*, 108. It is equally bad on motion in arrest. *Balto. Cemetery Co. vs. The First Independent Church*, 13 *Md.*, 117.

In a case of this kind, where the plaintiff delays to prosecute his claim against the principal for five years after the suit is brought, and where there is no allegation of insolvency or insufficiency of the principal's estate, it is believed that the sureties are justly entitled to the full measure of all their legal defences.

As to necessity of averring insolvency of principal. *Seegar vs. State*, 5 *H. & J.*, 488 ; *Dorsey vs. State*, 5 *G. & J.*, 471.

No reasons were filed in support of the motion in arrest. None were necessary. *Ch. Hall School vs. Greenway*, 4 *G. & J.*, 407.

*Oswald Tilghman*, for the appellee.

Any irregularities, imperfections or omissions in the pleadings, and all errors and defects appearing on the face of the proceedings, was cured by the verdict, upon issues joined. *Code*, vol. 1, *Art.* 75, *sec.* 9.

Assigning the breaches in the replication, has the same force and effect as if the breaches had been fully set out in the *narr.* Here the true cause of action is fully set out in the replication, on the assignment of breaches, and the replication is to be considered as a declaration. If the breaches had been defectively assigned, they might have been demurred to. *Jarrett vs. State, use of Stump*, 5 *G. & J.*, 27.

The questions raised by the appellants in their brief, are not properly before the Court, as it will be assumed, there being no evidence to the contrary in the record that

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all the facts necessary to be proved to justify the verdict, were so proved below, and the points now argued not having been raised below, cannot be passed upon by this tribunal. *Code, vol. 1, Art. 5, sec. 12; Code, vol. 1, Art. 75, sec. 9.*

The failure of the guardian to exhibit a final account to the Orphans' Court, and to deliver up to his ward, upon her marriage, or to her husband, all the property of his ward in his hands, rendered his bond at once liable to be put in suit. *Code, vol. 1, Art. 93, sec. 192; Fridge vs. State, use Kirk, 3 G. & J., 103.*

As the account is to be rendered to the Court after the ward becomes of age, its jurisdiction and control of both fund and guardian remains responsible for the estate committed to its charge, and the obligation of the bond must be taken as co-extensive with the duty and accountability of the guardian; upon no other construction would the bond afford the security intended by the law. *Griffith and Wife vs. Parks, et al., 32 Md., 1.*

There is no rule founded in principle or justice that would require a creditor to exhaust his remedies against the principal, before resorting to the surety, for payment of a debt for which both principal and surety are equally bound. *Garey vs. Hignutt, 32 Md., 552, 560; Addison vs. Bowie, 2 Bland, 606; Watkins vs. Worthington, 2 Bland, 533, and authorities there cited.*

An action may be maintained against a surety or sureties without suing the guardian, and an order from the Orphans' Court, directing the guardian to pay the ward, is not essential to the right of action. *Jarrett vs. State use of Stump, 5 G. & J., 27.*

Sec. 106, of Art. 93 of the Code, has no application to the case of a guardian bond.

A guardian is only liable to his ward, while an administrator may be liable personally to distributees, and can only be liable to the creditors of the decedent for any

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debt or damages due from or recovered against the decedent, to the extent of assets in his hands. The case contemplated by sec. 106 of Art. 93 of Code, could never by any possibility arise under a guardian's bond.

BRENT, J., delivered the opinion of the Court.

We do not think the record in this case discloses any error committed by the Circuit Court in overruling the motion made by the appellants in arrest of judgment. The case, it is true, has been pending for a long period of time, but the parties have been duly represented in Court by their respective counsel, and the docket entries show that it is brought up by regular continuances to the term at which it was finally tried. In this respect there is certainly no irregularity.

The suit was originally instituted against William B. Clark and these defendants. Upon the suggestion of the death of William B. Clark, at May Term, 1865, it was continued against them as surviving obligors. In July, 1870, the declaration was filed, together with the guardian bond of Clark upon which these appellants are sureties. The declaration contains a single count, averring that these appellants, by their written obligations, dated the sixth day of October, eighteen hundred and fifty-six, promised to pay to the State of Maryland, for the benefit of Mary H. P. Muse, now Mary H. P. Cox, and wife of L. P. Cox, the sum of five thousand dollars, &c. The defendants pleaded general performance. The plaintiff then replied, setting out the names of the obligors in the bond with particularity, stating the death of William B. Clark, the guardian, assigning breaches. To this replication issue was joined, and the case tried before a jury.

It is here objected that the replication is a departure from the declaration, which refers to a writing obligatory of two joint obligors, while the replication sets out a bond by which a third party, not named in the declaration, is

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bound as principal and they as sureties. What would be the effect of this objection in a different state of pleadings it is not necessary to examine, but upon the pleadings in this case we think it cannot be sustained. The case is brought to an issue upon the replication, and the questions thereby presented have been distinctly submitted to the jury and passed upon by them. The pleadings present a sufficient cause of action, and when the bond was offered in evidence there could have been no valid objection to it upon the ground of a difference between the *allegata* and *probata*. The defendants could have demurred to the replication upon the ground of a variance, and, if decided in their favor, a proper amendment of the pleadings could have been made before the case went to trial upon its merits. But having taken issue and the case having been decided against them, as it was presented by their pleadings, the objection made is not tenable upon a motion in arrest.

The next objection is that there are no sufficient breaches set out in the replication.

The defendants, by their bond, conditioned that the guardian should faithfully account with the Orphans' Court of Dorchester County, as directed by law, for the management of the property and estate of the orphan under his care and deliver up said property agreeably to the order of said Court or the directions of law. A failure to do these things is certainly a breach of the bond. The replication avers a failure to account and the non-payment over of the money alleged to be due the ward. It is not well perceived how a more substantial breach could be alleged. It is also objected that the replication does not allege that the ward had become of age before suit brought. Demand and default to pay are alleged, and this is sufficient. If the party had no right to sue it could have been put in issue by the pleading, and was the proper subject of proof. This objection is not tenable.

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The next objection is that suit should have been prosecuted against the guardian, or his insolvency alleged, before the bond became liable to an action. The question is not an open one in this State. It was presented in the case of *Jarrett vs. State, use of Stump*, 5 G. & J., 27.

It was there held that an action could be maintained upon a guardian bond without having previously sued the guardian. An allegation of insolvency is necessary only where suit is required to be first brought against a party, before an action can be maintained against his sureties. But as no such action is required to be brought against a guardian before suing his bond, the allegation is wholly unnecessary.

Finding no error in the order of the Court overruling the motion in arrest, the judgment will be affirmed.

*Judgment affirmed.*

(Decided 13th June, 1877.)

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THOMAS G. HAYES, RECEIVER OF THE SOUTH ANN  
STREET SAVINGS ASSOCIATION OF BALTIMORE CITY  
*vs.* JOSEPHINE BROTZMAN, and others.

*Authority of receivers to bring suits—Act of 1868, ch. 471,  
sec. 195.*

In an action brought by a receiver, appointed to wind up the affairs of a corporation, by a decree which directs, that he "shall prosecute and defend all suits at law, that may now be pending or may be hereafter instituted, in which said corporation may be a party," it was HELD:

1st. That as the cause of action arose before the appointment of the receiver, it was necessary in order to maintain the action in his name, that it should be made to appear there had been conferred upon him the power and authority to sue.



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2nd. That such power and authority was conferred by the terms of the decree above set forth.

The plaintiff receiver was not the person named as such in the original decree. But upon the refusal of the first receiver to act he was appointed in his stead with the same authority and powers. **Held:**

That being substituted for the first receiver, the plaintiff was necessarily clothed with the authority and required to perform the duties of the first receiver.

The Act of 1868, ch. 471, sec. 195, provides that "whenever a receiver of the property or effects of a corporation, shall be appointed before the dissolution or afterwards, new suits may be brought and carried on by any such receivers, either in their own names and capacity, or in the name of the corporation, for which they shall have been appointed; but no new suit shall be brought in the name of a corporation after it shall have been dissolved, or after the expiration of its charter." **Held:**

1st. That apart from the authority expressed in the decree, the above section conferred ample authority to maintain the action.

2nd. That the order of the Circuit Court appointing the receiver, being the order of a Court of competent jurisdiction to pass it, carried with it the presumption of regularity; and it was not necessary that the plaintiff should have offered proof, that the Circuit Court had acquired jurisdiction to pass the order by proper averments in the bill of complaint or petition.

3rd. That the order standing in full force must be taken as establishing, at least *prima facie*, that all the necessary averments were made, and proceedings had to give jurisdiction to the Court.

4th. That when the appointment of the plaintiff, as receiver, was established by the exhibition of the order of the Circuit Court of Baltimore City, his right to maintain the action was sufficiently shown.

5th. That where a statute gives to the receiver a right to sue, there is no necessity to show special authority from the Court appointing him.

### APPEAL from the Court of Common Pleas.

The South Ann Street Savings Association of Baltimore City was incorporated under the provisions of the Act of 1868, ch. 471. Under proceedings in the Circuit Court of Baltimore City, the Court passed the following decree.

"The bill and answer in the above cause having been read and considered, and the same submitted for decree, it

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is thereupon on this, the 18th day of August, A. D. 1875, by the Circuit Court of Baltimore City, adjudged, ordered and decreed, that J. Thomas Scharf be, and he is hereby appointed receiver of the South Ann Street Perpetual Savings Association of Baltimore City, and that the said association turn over to the said receiver all its books, papers, promissory notes, writing obligations, *choses in action*, claims, demands, property and assets and that the said receiver shall proceed to wind up the affairs of the said association—the ulterior object of this decree being that the property and assets of the said defendant shall be equitably distributed among the creditors of the said defendant.

“And it is further ordered, that J. Thomas Scharf, the receiver aforesaid, give notice to all creditors of the said defendant to file their claims in this cause, and upon the proof of the same that the said creditors be allowed their distributive portion of the assets of the said defendant.

“And it is further ordered, that the said J. Thomas Scharf, receiver as aforesaid, shall prosecute and defend all suits at law that may now be pending, or may be hereafter instituted, in which the said defendant may be a party.

“And it is further ordered, that the said J. Thomas Scharf, the receiver aforesaid, before he enters upon the discharge of the duties of the said receiver, shall give the usual bond in the penalty of five thousand dollars, for the faithful performance of his duties as said receiver.”

By a subsequent order passed in that case, J. Thomas Scharf was released from acting as said receiver, and Thomas G. Hayes was appointed receiver in his stead, with the same authority and powers.

The present action was instituted by the new receiver, upon a promissory note given by the appellee and two others to the South Ann Street Perpetual Savings Association of Baltimore City, dated March 30th, 1874. The

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declaration contained the usual money counts and a count upon said note. The appellee only was summoned; and filed pleas of "never indebted, did not promise as alleged." And a further plea "That she did not sign the promissory note set out in the seventh count."

Upon these pleas issue was joined.

*Exception.*—At the trial admission was made of the due incorporation of the association under the Act of 1868, ch. 471, the appointment of the receiver under the decree and order above mentioned, and his qualification.

The plaintiff then took the witness' stand to testify, when the defendant's counsel objected to any testimony being given by the plaintiff, until he had proven his authority to bring this suit; the plaintiff then admitted he had no other authority than that contained in the decree aforesaid, and that conferred by the laws of Maryland, Act of 1868, chapter 471. The Court, (GAREY, J.) sustained the objection, and instructed the jury that the plaintiff had not shown by any evidence any authority to institute this suit, and their verdict must be for the defendant. The plaintiff excepted.

The jury rendered a verdict for the defendant, and judgment was entered accordingly.

The cause was argued before BARTOL, C. J., BOWIE, BRENT and ROBINSON, J.

*Thomas G. Hayes* and *Thomas R. Clendinen*, for the appellant.

The decree expressly directs the receiver "to wind up the affairs of said association," and the decree further orders the receiver to "prosecute and defend all suits at law that may now be pending or may be hereafter instituted in which the said defendant may be a party." The decree appointing the receiver, by its terms expressly confers authority upon the receiver to sue, and there was no

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necessity for special authority. The term "collect" has been held sufficient to authorize the receiver to sue without any other special authority. *Holme, Receiver vs. Littlejohn*, 12 La. An., 298; *Everett, et al. vs. State, et al.*, 28 Md., 207; 2 Code, Art. 1, section 102, page 29; *Freeman vs. Winchester*, 18 Miss., 580.

The appellant is receiver of a body corporate, incorporated under Act of 1868, ch. 471, and this Act expressly authorizes, "that whenever a receiver of the property or effects of a corporation shall be appointed before the dissolution or afterwards, new suits may be brought and carried on by any such receiver." *Act of 1868, ch. 471, section 195.*

A receiver authorized by Statute "to take charge of all the personal estate, goods, chattels, property and effects of every description whatever \* \* \* and collect and make available the evidences of debt, and sell and dispose of upon such terms, &c.," needs no special authority to bring a suit, but has ample power conferred by statute. 2 Code, Art. 1, section 102, page 29; *Everett, et al. vs. State, use, &c.*, 28 Md., 207.

If a statute gives the receiver authority to sue, there was no necessity for special authority from the Court appointing the receiver to bring the suit. *High on Receivers*, sections 211, 212; *Baker vs. Cooper*, 57 Me., 388; *R. S. of Maine*, (1857) section 64, page 344; *Manlove, Receiver vs. Burger*, 38 Ind., 211; 1 Stat. of Ind., (G. & H.) sections 12, 16, page 270.

C. Dodd McFarland, for the appellee.

The Act of 1868, ch. 471, does not confer authority on the receiver to bring this suit. It does not appear, from the record, that application was made to the Circuit Court of Baltimore City to wind up the affairs of the association or to appoint a receiver under any of the provisions of that Act. Unless the bill or petition for the appointment of a receiver was filed under some provision of that law, the

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appellant cannot rely on it for authority for bringing this suit. Evidence should have been offered at the trial of this case, in the Court of Common Pleas, if any such existed, to show that the Circuit Court of Baltimore City acted under the provisions of the Act, 1868, ch. 471, in appointing the appellant receiver, and that it acquired jurisdiction to do so by proper averments in the bill of complaint or petition, otherwise he cannot invoke its provisions in this suit. *Bangs vs. McIntosh*, 23 Barb., 591.

In the case of *Everett, et al. vs. State, use, &c.*, 28 Md., 190, the receivers were appointed under Art. 1, sections 99, 103, Code of Public Local Laws, and derived their authority to sue under the provisions of that law, and the special circumstances of the case. This was an appointment of a receiver in the ordinary case, under the general equity powers of the Court.

Receivers have no authority to institute actions without the sanction of the Court appointing them. *Kerr on Receivers*, 192, 193, 200 and 201; *Edwards on Receivers in Equity*, 135 and 136; *High on Receivers*, section 208, top page 138; *Story's Eq. Jur.*, section 833 a.

The decree does not confer authority on the receiver to institute this action, but merely that he shall prosecute and defend such suits as may now be pending or may be hereafter instituted. The Court did not by its decree intend to confer authority on the receiver to bring suits, incur costs and expenses *ad libitum*.

BRENT, J., delivered the opinion of the Court.

As the cause of action in this case arose before the appointment of the receiver, it is necessary, in order to maintain the action in his name, that it should be made to appear he has had conferred upon him the power and authority to sue.

That such power and authority has been conferred we think is clear. The terms of the decree, under which he

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is acting, direct that the receiver "shall prosecute and defend all suits at law that may now be pending or may be hereafter instituted, in which said defendant may be a party." The object of the decree was "to wind up the affairs" of the South Ann Street Perpetual Savings Association through the hands of a receiver, and when the decree authorises the receiver to prosecute suits at law which may thereafter be instituted in which the association may be a party, the construction can well be given to it so as to embrace suits in which the association may be a party in interest. The object aimed at by the decree is to collect the property and assets of this association, which had been duly incorporated, in the hands of a receiver, in an available form, so that they might be equitably distributed among the creditors. To accomplish this, the Court saw and understood that suits might become necessary, and in that part of the decree which we have quoted has sufficiently expressed its intention and purpose thereby to confer upon the receiver the authority to institute and prosecute them when the necessity to do so might arise.

The present receiver is not the person named as such in the original decree; but, on the refusal of the first receiver to act, he was duly appointed in his place and stead. Being substituted for him, he was necessarily clothed with the same authority and required to perform the same duties. Were it otherwise, he could not be said to have been appointed to act in his place and stead.

But apart from this, the *Act of 1868, ch. 471, sec. 195*, confers ample authority to maintain this action. It provides that, "whenever a receiver of the property or effects of a corporation shall be appointed before the dissolution or afterwards, new suits may be brought and carried on by any such receivers, either in their own names and capacities as such receivers or in the names of the corporation for which they shall have been appointed; but no new suit shall be brought in the name of a corporation after it

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shall have been dissolved, or after the expiration of its charter." The order of the Circuit Court for Baltimore City, offered in evidence, appointing a receiver of the property and effects of this corporation, being the order of a Court of competent jurisdiction to pass it, carried with it the presumption of regularity. It was not necessary, as contended by the appellee, that the appellant should have gone further and offered proof that the Circuit Court had acquired jurisdiction to pass the order by proper averments in the bill of complaint or petition. The order, standing, as it does, in full force, must be taken as establishing, at least *prima facie*, that all the necessary averments were made and proceedings had to give jurisdiction to the Court.

When the appointment, therefore, of this appellant as receiver was established by the exhibition of the order of the Circuit Court of Baltimore City, we think his right to maintain this action was sufficiently shown.

The authorities cited by the appellant fully support the doctrine that, where a statute gives to the receiver a right to sue, there is no necessity to show special authority from the Court appointing him. So that, even if the order in this case was silent as to the right to maintain this action, the authority to do so is ample under the Act of Assembly.

As a consequence, we think the Court erred in the view expressed in the bill of exceptions, and the judgment will be reversed.

*Judgment reversed, and  
a new trial ordered.*

(Decided 13th June, 1877.)

EDWARD GRAVES and CAROLINE E. GRAVES, his Wife,  
and others *vs.* WILLIAM SPEDDEN and MARY E.  
SPEDDEN, his Wife, and others.

*Advancement—Admissibility of parol evidence to show whether a gift or an advancement was intended—Res Gestæ—Competency of Witnesses under sec. 2 of the Act of 1864, ch. 109, as modified by the Acts of 1868, ch. 116, 1874, ch. 385, and 1876, ch. 222.*

In this State, as in England, a gift of money or property by a parent to a child is presumptively an advancement, but this presumption may be repelled or rebutted by evidence proper for the purpose.

Whether such a gift takes the character and legal properties of an advancement, or those of a full and absolute gift without a view to a portion or settlement, depends on the intention of the donor.

And that intention may be ascertained by parol evidence of the donor's declarations at the time of executing the conveyance or making the gift, or of the donee's admissions afterwards; or by proof of facts and circumstances from which the intention may be inferred.

A father in consideration of natural love and affection, conveyed by deed his home farm to his three sons, R., W. and C. on condition, that it should never be sold out of his family, and reserved to himself a life estate therein. It was not expressed in the deed whether the conveyance was intended as a gift or an advancement. **HELD:**

That neither the restriction upon alienation, nor the reservation of a life estate indicated any intention to make it other than an advancement.

A bill was filed by R. against his brothers and sisters, and the children of two deceased sisters, for a partition of the other real estate of which the father died seized and intestate. The daughters averred in their answers, that the three sons, R., W. and C. were advanced in their father's life-time by the conveyance to them of his home farm, and that H. the other son had borrowed of his father \$1500 secured by his notes, which his father in his life-time had destroyed with a view of giving this sum of money to H. as



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an advancement; and they asked that these advancements might be brought into the estate for division with the other property. The complainant R. was called as a witness by his brothers, who were some of the defendants to the bill, but had the same interest in the question at issue as himself. This witness after stating several previous conversations with his father, in which the latter expressed his wish to deed the farm to his three sons to whom it was afterwards conveyed, testified in substance, that his father gave him written instructions for the preparation of the deed, and assigned as a reason for giving his boys more than his girls, that both his grandfathers had done so, and added "You boys have made the most of my money, and I am determined you shall have the most of it, and you are standing in your own light in not having the deed prepared." That witness went to town the following Monday, and got the deed prepared. On the next day he took the deed over to his father who approved it, and said "When this deed is executed I am going to destroy H's notes." Witness then said to him, "I thought you once said H. had gotten his part." To which his father replied, "I did say so, but there has something accumulated since, and I have changed my mind," and further said, "When I destroy H's notes, it will make him fully equal with you and W. in the land, but not quite as much as C." That his father then also said, "I want you boys to have that *much more* than the girls, and *all the rest* of my property I want divided *equally among all my children*; this will give you \$1000 or \$1200 a piece, and that will be a nice little present for each of you." That his father then appointed the following Saturday, which was the usual business day in that part of the county, for the execution of the deed, but finding the magistrate was from home, he afterwards postponed it until the next Saturday; on which day the deed was executed and delivered to witness to get it recorded, which was done. **Held:**

- 1st. That said declarations were part of the *res gestæ*, and properly received in evidence for the purpose for which they were offered.
- 2nd. That the declarations respecting the gift to his son H. by the destruction of his notes, being made at the same time and under the same circumstances, were of the same character.
- 3rd. That the declaration of his intention to destroy these notes at the time the deed was executed, coupled with the facts, proved in the case, that they were never afterwards seen in his possession, nor found among his papers after his death, justified the inference that he then destroyed them.
- 4th. That the sufficiency of these declarations to repel the presumption that these gifts were advancements to the sons could not admit of doubt.

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- 5th. That the complainant was competent to prove on his own offer the declarations made to him by his father.
- 6th. That the declarations proven by him did not constitute a *cause of action* upon which the father if living could have been sued; nor did they constitute or evidence, in the legal sense of the term, a *contract* between the party making them and the party to whom they were made.
- 7th. That the said declarations constituting part of the *res gestæ* were verbal acts, and might be proved by the same witnesses, whom the law has made competent to prove other facts relevant to the issues made up in the pleadings.
- 8th. That their tending to establish a fact that would carry the point in dispute in favor of the party testifying, did not disqualify him, the statute having removed the disqualification of interest.
- 9th. That it made no difference that the declarations were made by a party who was dead at the time they were proven.

APPEAL from the Circuit Court for Dorchester County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER and ALVEY, J.

*S. T. Milbourne* and *Wm. Shepard Bryan*, for the appellants.

It is a presumption of law that the gifts to the appellees were advancements; and it is incumbent on them to repel this presumption by competent and credible proof. *Clarke vs. Willson*, 27 Md., 693.

The evidence offered to repel this legal presumption consisted entirely of declarations attributed to the deceased, which were not made at the time of the gifts. This evidence was incompetent, and was excepted to. *Clarke vs. Willson*, *ubi supra*.

The testimony of the appellees is excepted to, likewise, on the special ground, that it contravenes the Act of 1868, chapter 116. The direct and special object of the petition

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was to establish these gifts as advancements. The inquiry was whether they had any effect whatever upon the distribution of the residue of the decedent's estate. The petitioners maintained that they operated to exempt it *pro tanto* from the claims of the donees to a distributive share. And the testimony of the appellees, after the death of an original party to the transaction, was intended to establish for them by virtue of their evidence, a claim on this residue, which they could not have by the force and effect of the gifts themselves standing alone.

The only testimony offered by the appellants, which was excepted to, was that of Graves and Mrs. North. They were not parties to any transaction with the deceased, and therefore their evidence is not excluded by the Act of 1868, ch. 116. The other evidence of the appellants shewed an anxious desire on the part of the decedent, that his property should be equally divided between his heirs-at-law, and rebutted and contradicted the evidence which sought to shew that these gifts were not advancements. But if the appellees' testimony is incompetent, the appellants needed no evidence whatever; the law declares the gifts to be advancements.

The declarations of the deceased were admissible only as part of the *res gestæ*; and they do not come within the rule on this subject. 1 *Greenleaf Ev.*, sec. 110; *Lund vs. Tymborough*, 9 *Cushing*, 36; *Commonwealth vs. Howard*, 4 *Gray*, 41.

The gifts were contracts executed, (2 *Blackstone*, 443;) *Fletcher vs. Peak*, 6 *Cranch*, (S. C.,) 136-7, and were as much within the prohibition of the Act of 1868, as the gift in *Johnson vs. Heald*, 33 *Md.*, 352.

*D. M. Henry* and *Sullivan*, for the appellees.

1. There are facts and circumstances disclosed in the testimony, and not excepted to, sufficient to show conclusively that the gifts of the intestate, in his life-time,

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to the appellees, were not by way of advancement, but intended to be absolute. These facts and circumstances appear on the face of the conveyance to his sons, in the admission of facts, and in acts and declarations not expressing intention, testified to by the witnesses, from which the donor's intention can be clearly inferred. 1 *Greenleaf*, 287 and 289, approved in *Warner vs. Miltenberger's Lessee*, 21 *Md.*, 264.

2. The declarations of the donor to Robert B. Spedden, are clearly admissible and of controlling effect. They are so nearly connected with the conveyance and gift as to form part of the *res gestæ*. Both antecedent and subsequent acts and declarations may form part of the *res gestæ*. It is not essential that they should be exactly contemporaneous with the principal transaction. *Holb vs. Whiteley, Trustee*, 3 *G. & J.*, 188; *Handy & Tull vs. Johnson*, 5 *Md.*, 450; *McDowell, et al. vs. Goldsmith*, 6 *Md.*, 319; *Central of Bank of Fredk. vs. Copeland and Wife*, 18 *Md.*, 305; *Cooke, Garn. vs. Cooke*, 43 *Md.*, 522; *Walton vs. Green*, 1 *Car. & Payne*, 498; 2 *Bingham*, 99; *Milford vs. Billingham*, 16 *Mass. Rep.*, 108; *Mitchem vs. State*, 11 *Georgia Rep.*, 627, approved in *Shareswood's Notes on Starkie on Evidence*, m. p , 89; *Phillips on Ev.*, note 552, p. 590; 1 *Greenleaf on Ev.*, sec. 108.

3. Antecedent and subsequent declarations of a donor, as to his intent, are inadmissible when the question is advancement, *vel non*. Declarations a long time antecedent to the principal transaction, have been admitted to impeach a conveyance for fraud. *Cooke, Garn. vs. Cooke*, 43 *Md.*, 522.

Declarations made through a series of years, both antecedent and subsequent to the execution of a paper, have been received for the purpose of establishing it as a will. *Devecmon vs. Devecmon*, 43 *Md.*, 335; see also, *Lungren, et al. vs. Swartzwelder, et al., Ex'rs*, 44 *Md.*, 482.

*A fortiori*, should such declarations be competent, when offered neither to establish nor to impeach the validity

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of a conveyance or gift, nor to affect the title of the grantee or donee, nor to vary, contradict or add to the terms of a written instrument, but solely for the purpose of showing the donor's intention collaterally, in order that the nature of the conveyance or gift may be considered in the division and distribution of property not embraced in it, of which the donor afterwards dies seized and possessed, intestate. Besides, an advancement is convertible into an absolute gift by the sole act of the donor, at any time before his death. Upon what principle then in such case, could subsequent acts and declarations be excluded, if offered to prove the intent to convert? And if admissible for such a purpose, why not admissible also for the purpose of showing the intent of an antecedent conveyance or gift, and to rebut the presumption of advancement, which without such explanation would arise? The case of *Wheeler vs. Wheeler*, 47 *Vermont Rep.*, 637, and the cases therein referred to, establish by unanswerable reasoning, the convertibility of an advancement into an absolute gift, and show that this may be accomplished by sufficient entries, (technically mere parol,) in his account-book, made by the donor alone, twenty years after the delivery of the property to be affected.

MILLER, J., delivered the opinion of the Court.

By this record it appears that John Spedden died in August, 1873, intestate, leaving four sons, five daughters, and the children of two deceased daughters as his sole heirs-at-law and distributees of his personal estate. In January, 1874, a bill was filed by the eldest son for a sale, for the purpose of partition of certain real estate of which his father died seized and possessed, and to this bill all the other heirs-at-law were made defendants. No question is made as to the necessity of a decree for the sale of this property, but the daughters and adult grandchildren aver in their answers, that the three sons, Robert, William

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and Charles, were advanced by their father in his life-time by the conveyance to them of his "Home Farm," and that Hugh, the other son, had borrowed of his father \$1500 secured by his notes which his father in his life-time destroyed, with a view of giving this sum of money to Hugh as an advancement, and they ask that these advancements may be brought into the estate for division with the other property, and that the sons may be excluded from any participation in the proceeds of the sale of the real estate sought to be sold under this bill, and in all the property which the deceased held at the time of his death. The same question is presented by some of the defendants by a petition or cross-bill, and whether these benefits to the sons are to be treated as advancements or as absolute gifts, is the only question which this appeal requires us to decide.

In this State as in England, a gift of money or property by a parent to a child, is presumptively an advancement, but this presumption may be repelled or rebutted by evidence proper for the purpose. In other words, whether such a gift takes the character and legal properties of an advancement or those of a full and absolute gift without a view to a portion or settlement, depends on the intention of the donor, and that intention may be ascertained by parol evidence of the donor's declarations at the time of executing the conveyance or making the gift, or of the donee's admissions afterwards, or by proof of facts and circumstances from which the intention may be inferred. These propositions have been so firmly established by a series of adjudications in this Court as to be no longer open to controversy. *Stewart vs. Patterson*, 8 Gill, 55; *Parks vs. Parks*, 19 Md., 323; *Cecil vs. Cecil*, 20 Md., 153; *Clark vs. Wilson*, 27 Md., 693. The law as thus settled, must be applied to the proof and the facts and circumstances of each case as it arises. In this sense it appears that the father, in consideration of natural love and affec-

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tion, conveyed by deed, his home farm to his three sons, Robert, William and Charles, on condition that it should never be sold out of the Spedden family, and reserving to himself a life estate therein. The deed itself affords no solution of the difficulty. Neither the restriction upon alienation nor the reservation of a life estate indicates any intention of the donor to make it other than an advancement, which the law declares it to be where the conveyance is silent as to its design in this respect. Nor do we find in any of the facts or circumstances of the case, apart from the declarations of the donor proved by parol evidence, anything from which we can draw the inference of a contrary intention. But if the declarations of the donor, upon which the appellees rely, be admitted in evidence, and proved by a competent witness, they are conclusive of the question.

The testimony thus relied on is that of Robert Spedden, the complainant, who was called as a witness by his brothers, who were some of the defendants to the bill, but had the same interest in the question at issue as himself. This witness, after stating several previous conversations with his father, in which the latter expressed his wish to deed this farm to his three sons, to whom it was afterwards conveyed, testified in substance, that in the last conversation before the deed was drawn, his father urged him to have it prepared, saying life was uncertain, and to this witness replied he could not have it drawn without some papers to draw it by; his father then said he would write the directions and give them to him the next time he came over, and then assigned as another reason for giving his boys more than his girls, that both his grand-fathers had done so, and added, "you boys have made the most of my money, and I am determined you shall have the most of it, and you are standing in your own light in not having the deed prepared." The next time witness went over, his father gave him written directions prepared by himself

for the preparation of the deed. These directions, which were produced in evidence, seem to have been faithfully embodied in the instrument which was afterwards executed. The witness then further testifies that when his father gave him these instructions he said, you are a county commissioner, and when you go to town you can have the deed prepared; that he went to town the following Monday, and gave the instructions to Reuben W. Hall, and got him to prepare the deed; on the next day witness took the deed over to his father, who read it over and said it was all right, and ought to have been done before: I wanted to give the farm to you boys, and you stood in your own light in not having it done before; and he further said, "when this deed is executed I am going to destroy Hugh's notes:" witness then said to him, "I thought you once said Hugh had gotten his part," to which his father replied, "I did say so, but there has something accumulated since, and I have changed my mind;" and further said, "when I destroy Hugh's notes it will make him fully equal with you and William in the land, but not quite as much as Charlie;" that his father then also said, "I want you boys to have that *much more* than the girls, and *all the rest* of my property I want divided *equally among all my children*; this will give you \$1000 or \$1200 more apiece, and that will be a nice little present for each of you," and asked witness not to mention this, as the girls might be jealous if they found out the boys would get more than they did; that his father then appointed the following Saturday, which is the usual business day in that part of the county, for the execution of the deed, but finding that the magistrate was absent from home, he afterwards postponed it until the next Saturday, and on that day his father, witness and his brother William, and the magistrate, met by appointment at a neighboring school house, and the deed was signed and acknowledged, and then delivered by his father to witness to be taken to



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the clerk's office to be recorded, which witness did, and it was duly recorded.

Now, it is contended by the appellants that these declarations are inadmissible because they were not made "at the time" the deed was executed. But we do not understand that in either of the cases referred to the Court intended to lay it down as an inflexible rule that such declarations were inadmissible unless made exactly contemporaneous with, or at the very instant the act of signing the deed, which perfected the gift, took place. When they declared that the character of the estate conveyed in respect to its being an advancement or an absolute gift follows the *intention* of the donor, and that such intention could be ascertained by parol evidence of his declarations "at the time of executing the conveyance." We think they intended nothing more than to state the general rule that such declarations, when offered in proof, must, in order to be admissible, form part of the *res gestæ*, that is, must be so connected with the *making of the gift* as to determine its character in this respect. On this general subject the Courts have never attempted to fix an unbending rule applicable to all cases.

As has been said by the highest authority on the law of evidence, admissibility of circumstances and declarations in such cases must be determined by the judge according to the degree of their relation to the principal fact and in the exercise of his sound discretion, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and *whether they were so connected with it as to illustrate its character*. 1 *Greenlf. Ev.*, sec. 108. To examine and review the multitude of cases in which questions of this character have arisen is a task we shall not attempt, nor does the exigency

of the case before us require it. In *Cross vs. Black*, 9 G. & J., 198, a case quite analogous in principle to the present, where it was important to show to what State a party intended to remove and reside on leaving Maryland, the Court said: "One of the acknowledged exceptions to the rule which prohibits a party from producing his own declarations in his favor is where such declarations are necessary in explanation of an act, which takes its *character* from the *design and intention* of the party who does it. The declarations made at a time when occasioned by no perceptible motives of interest, like other circumstances surrounding an act, are in such instances considered as part of the *res gestæ*." And in that case, declarations of the party *while making preparations* for his removal, though made some months before he actually took his departure, were held to be within the rule and admissible in evidence. Here the declarations (which alone were admitted by the Court below) were all made when the instructions by which the deed was to be drawn, and which the donor himself had written out, were delivered by him to the witness, his son, or after the deed had been prepared, read over and approved by him, and when he appointed a convenient business day shortly thereafter for its execution and acknowledgment before a magistrate. The fact that the actual execution and acknowledgment were accidentally delayed for a week does not, in our judgment, render them inadmissible. They were declarations made by the donor whilst the instrument, which was to perfect the gift, was in course of preparation and but a short period before it was actually executed. In our opinion, they were properly received in evidence for the purpose for which they were offered. It was not necessary, in order to effectuate his purpose thus recently and explicitly declared, for him to repeat in the presence of a stranger, at the moment he signed his name to the deed, his intention, in the distribution of his property, to give a preference to his sons over

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his daughters, especially when, to avoid jealousy and resentment on their part, he had expressed a wish that that intention should be concealed from the latter. A careful consideration of the cases before referred to and an examination of the original records containing the facts in reference to which these decisions were made, have satisfied us this Court has neither sanctioned nor adopted any such rigid rule as would exclude, in cases of this character, declarations of intention made at the time and under the circumstances disclosed by the proof in this record. The declarations respecting the gift to his son Hugh, by the destruction of his notes, were made at the same time, under the same circumstances, and are of the same character. He declared his intention to destroy them when the deed was executed, and this, coupled with the fact, proved in the case, that these notes were never afterwards seen in his possession, nor found among his papers after his death, justifies the inference that he then destroyed them. Being, therefore, admissible for that purpose, the sufficiency of these declarations to repel the presumption that these gifts were advancements to the sons cannot admit of doubt.

The remaining inquiry is were they proved by a competent witness? In deciding this question we shall assume the complainant testified upon his own offer. Incapacity of witnesses on the ground of interest was removed by the Evidence Act of 1864, ch. 109, and parties to suits were allowed to testify for themselves save in certain specified cases. These exceptions so far as this case requires them to be considered, are these contained in the second section of the original Act as modified by the Acts of 1868, ch. 116, 1874, ch. 385, and 1876, ch. 222. In *Johnson vs. Heald, Ex'r of Frazier*, 33 Md., 352, we had occasion to consider and construe a part of the Act of 1868. There an executor was a party to the suit and he had, under the clause in the proviso to this statute relating to conversa-

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tions had with the opposite party, testified, upon his own offer, as to such conversations respecting the cause of action or controversy, which antedated the death of the testator, and we held that the other party could there on his own offer testify in respect to *such conversations*, by giving such evidence as would fairly tend to contradict, explain or modify them, *but no further*. Here there is no executor or administrator a party to the suit, and the point there decided does not arise in this case. If the complainant is not competent to prove on his own offer these declarations made to him by his father, it must be because he is excluded by the clause running through all the statutes, which declares that "when an original party to a *contract* or *cause of action* is dead," neither party shall be admitted to testify on his own offer, or upon the call of his co-plaintiff or co-defendant. Now, what is the case before us? It will hardly be contended that the declarations proven constituted a *cause of action*, upon which the son could have sued his father if living, or his personal representative after his death. Nor do we perceive how they can be said to constitute or evidence, in the legal sense of the term, a *contract* between the party making them, and the party to whom they were made. As defined by Chancellor KENT, (2 *Kent's Com.*, 449,) a contract is "an agreement of *two or more* persons upon sufficient consideration to do or not to do a particular thing," but it would appear as strange to the legal as to the common mind, to say that if a party makes a *gift* or executes a *will* he thereby enters into a *contract* with his donee or legatee. Here a father was making a gift to his sons. The amount and terms of the gift itself, as well as whether it should be absolute in its character or by way of advancement depended solely upon his own will and intention, and in no manner upon the assent, concurrence or volition of the donees. What he said at the time was important to determine whether the gift assumed one or the other of

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these qualities. His declarations then made constituting part of the *res gestæ* are verbal acts, and may be proved by the same witnesses whom the law has made competent to prove other facts relevant to the issue made up in the pleadings. That they tend to establish a fact that will carry the point in dispute in favor of the party testifying, does not disqualify him, for the statute has removed the disqualification of interest. Nor does it make any difference that the declarations were made by one who was dead at the time they were proven. In *Jones vs. Jones*, 36 Md., 447, certain parties filed a petition in the Orphans' Court claiming as against the widow, one-half of the personal estate of an intestate on the ground, that they were his nephews and nieces. The fact of relationship was proved by declarations of deceased members of the family. The question was there raised whether the petitioners were competent witnesses to testify as to such declarations, and the Court held there was nothing in the Act of 1868, to exclude them, and that they were clearly competent. There as here the fact established by the declarations affected favorably to the parties testifying, the distribution of the estate in controversy. The only difference between that case and the present is, that the fact proven by the declarations in this case, affects the distribution amongst his children of the estate of the party making them, but it establishes no *contract* between him and the sons, nor any *cause of action* upon which they could ever have sued him or his executor or administrator. For these reasons it is our opinion the declarations were proved by a competent witness.

*Decree affirmed and  
cause remanded.*

(Decided 13th June, 1877.)

WILLIAM BUTLER *vs.* GEORGE A. RAHM.

*Various questions arising under a Mortgage by a Railroad Company; touching among other things, its construction, validity and effect—Assignee of judgment affected by same equities as the assignor—Priority of mortgage over judgment recovered before its registration—Injunction—Sale of hypothecated bonds without previous notice of sale—Equitable Mortgage.*

Case where mortgage bonds of a railroad company, dated on the 1st of October, 1871, were held to be embraced in a deed of mortgage, dated October 25th, 1871, the bonds being in other respects clearly described in the deed, and there being nothing in the terms of the deed inconsistent with the fact that they had been before executed.

In the same case, it was held, also, that if any doubt or ambiguity could arise on this subject, it was removed by parol evidence that no other bonds were executed or issued by the company except those dated on the 1st of October, 1871.

The real consideration for the mortgage being a security for the payment of said bonds, issued in conformity with a resolution of the company, it was  
HELD:

1st. That such consideration was sufficient.

2nd. That there could be no possible objection to the deed being made to third persons as trustees for the benefit of the bondholders.

3rd. That such deed being in effect a contract between the company and all persons who might become holders of the bonds thereby secured, they were entitled to the same benefit as if they were parties to the deed.

The charter authorized the company to pledge "its property and profits." The deed of mortgage conveyed "all the present and future to be acquired property of the company, and all its estates and franchises, that is to say:" and then followed an enumeration of the property and rights intended to be conveyed. **HELD:**

1st. That this enumeration limited and explained the previous words, and brought the terms of the deed within the limits of the legislative authority.

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2nd. That if it were construed otherwise as intending to convey the franchise to be a corporation, while in that respect it would be inoperative, it would not for that reason be entirely void, but would operate to convey the property of the company.

The deed contained the following provision, "but nothing herein contained shall prevent the said company before default in the payment of any of the said bonds or the interest due thereon, from selling, hypothecating or otherwise disposing of any of their said property, real or personal, not necessary in their judgment for the use of the said road, nor from collecting and applying any money due to the said company from any source whatever, provided said application shall not be to the prejudice of any holder of any of the said bonds." **Held:**

1st. That however suspicious the power here given might be in the case of a mortgage of ordinary goods, the very nature of its business, the means and power necessary to keep it up, the wear and tear of its iron, ties, and rolling stock, the constant necessity of replacing injured or worn-out appurtenances with new, forbade the inference of a fraudulent purpose which might arise from such a provision under other circumstances.

2nd. That while it is well settled that a party cannot convey subsequently to be acquired goods, so as to give the mortgagee a legal title thereto, or a legal right of action against a party seizing them, yet such a conveyance creates in equity a valid lien upon property subsequently acquired.

After the mortgage was executed, but before it was recorded in Somerset County, a judgment was recovered in the Circuit Court of that County against the mortgagor by the N. I. Company, which had notice of the mortgage as soon as it was executed. This judgment was afterwards assigned to B., who caused execution to be issued upon it. On a bill filed by the holder of some of the mortgage bonds against the assignee of the judgment for an injunction to restrain the execution, it was **Held:**

1st. That B. claiming as assignee of the judgment acquired only the rights held by the N. I. Company.

2nd. That as the N. I. Company had notice of the mortgage when the debt was contracted, and before the judgment was recovered, it must be postponed to the mortgage creditors, and it was immaterial that the mortgage was not recorded in Somerset County before the judgment was recovered.

3rd. That B. as assignee took subject to all the equities affecting the original plaintiff in the judgment.

When the original bill was filed and the injunction issued, the complainants' title to the bonds rested only on the allegation in the bill, that he "had come into possession of them, and now holds and owns the same." **Held:**

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That the Court might with propriety have refused to grant the injunction, for the want of sufficient proof to support the same. But this objection could not be urged in support of a motion to dissolve, the requisite proof having been supplied meanwhile by the production of five of the bonds and all of the overdue *coupons*.

The bonds in question had been hypothecated by the N. I. Co. as collateral security for the payment of certain discounted notes. The bonds were afterwards sold at public auction under the direction of the pledgee, default having been made in paying the notes; and the purchaser sold them to the complainant. The officers of the N. I. Co. were present at the sale, and no objection to the sale was made by that company, or by the railroad company. **HELD:**

- 1st. That the defendant claiming only under the N. I. Co. could not be heard to object to the validity of the sale on the ground of no previous notice having been given to the N. I. Co.
- 2nd. That in the absence of evidence to the contrary, the proceedings under which the bonds were sold would be presumed to have been regular.
- 3rd. That the possession of the bonds and *coupons* by the complainant, and their production in the cause was sufficient to give him a standing in Court and entitle him to relief.
- 4th. That it was not a valid objection that some of the bonds had been pledged by him to other persons as collateral security; he not having lost thereby his title as owner, and being entitled to maintain the suit for himself and all others having an interest as bondholders.
- 5th. That the complainant being a bondholder entitled to priority over the judgment creditor, was entitled to a continuance of the injunction.

**APPEAL** from the Circuit Court for Somerset County, in Equity.

The case is sufficiently stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER and ALVEY, J.

*John W. Crisfield* for the appellant.

*Henry Page* for the appellee.



BARTOL, C. J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Somerset County, continuing an injunction which had been issued at the instance of the appellee, complainant below, restraining the appellant from enforcing an execution upon a judgment recovered by "the National Iron Company" against "the Worcester and Somerset Railroad Company" which had been assigned to the appellant.

The bill alleges that the W. & S. Railroad Co. was duly authorized by its charter (Act of 1867, ch. 322. sec 15,) to issue bonds and pledge the property and profits of the company to secure their payment; that in pursuance of this power, and of the resolution of the board of directors, the railroad company issued its bonds to the amount of \$50,000, and to secure their payment with the interest thereon, executed the mortgage dated October 25th 1871 to Felton, Franklin and Clarke, trustees. These bonds, it is alleged in the bill, are now held and owned by the appellee.

The proof shows that the railroad company in the latter part of the summer of 1871, contracted with the "National Iron Company" a Pennsylvania corporation, for the purchase of a quantity of iron, for the purpose of constructing its road, amounting to about \$45,000. \$2000 of which was, by the contract, to be paid in cash, and for the balance the railroad company was to give its promissory notes at twelve and fifteen months, these notes to be secured by an issue of \$50,000 in "*first mortgage bonds*" as collateral security.

The iron was delivered under the contract, and the railroad company paid \$10,000 in cash on the 27th day of September 1871, and executed its four promissory notes dated October 1st 1871 as follows: One at forty-five days for \$5000, one at ninety days for \$5000, and two for \$12,500 each, payable one in twelve months, and one in fifteen months. To secure the payment of the

last two notes, the railroad company delivered to the National Iron Company its bonds amounting to \$50,000, dated October 1st, 1871, secured by the mortgage of October 25th, 1871. It appears from the proof the promissory note for \$5000, payable in ninety days, not being paid at maturity, was renewed on the 12th day of February 1872, by a note of that date for the same amount payable in four months. Upon this note suit was instituted by the N. I. Co., and a judgment was confessed thereon by the railroad company on the 18th day of October 1872, for \$5104.81.

The N. I. Co. having become bankrupt, this judgment was on the 23d day of July 1874, assigned to the appellant by Andrew H. Dill the assignee in bankruptcy, and a writ of *fi. fa.* was issued thereon on the 1st day of September 1874 and levied upon the property of the railroad company. To restrain this execution the injunction in the present case was issued; and upon the hearing of the motion to dissolve, on the pleading and proofs, the Circuit Court overruled the motion and continued the injunction. The propriety of the Court's action in this respect, is the only question presented by this appeal. Other judgment creditors were made defendants, and were also enjoined, but their rights are not now involved.

The claim of the appellee to relief is based upon the deed of mortgage to Felton, Franklin and Clarke, and depends mainly upon the solution of the following questions:

1st. Is the deed valid and effectual to secure the holders of the bonds dated October 1st, 1871?

2nd. Are the rights of the appellant as assignee of the judgment to be postponed to the rights of the bond holders?

3rd. Is the appellee a bondholder entitled to relief by injunction?

1st. As to the mortgage, its validity, legal operation and effect. It was executed on the 25th day of October

1871, and the appellant's solicitor construes it as referring to bonds thereafter to be issued, the bonds offered in proof are dated October 1st, 1871. But it clearly appears from the evidence that these are the bonds referred to in the deed and intended to be secured thereby. This appears from an inspection of the papers; the bonds correspond in all respects with those described in the recital in the deed, and declare on their face that they are secured by a first mortgage in which Felton, Franklin and Clarke, are the trustees. There is nothing in the terms of the deed inconsistent with the fact that the bonds had before been executed. But if any doubt or ambiguity could arise on this subject, it is removed by the testimony of *Dr. McMasters*, the president of the company, that no other bonds were executed or issued except those dated on the first day of October 1871, and these we think are clearly described in the deed.

It has been contended on the part of the appellant that the mortgage evidences no valid or binding contract, that it is a mere voluntary contract on the part of the company without consideration which a Court of equity will not enforce. This objection, in our opinion, is not well founded. It appears to be based on a misconstruction of the deed, taking as the consideration the recital it contains of the resolution of the board authorizing the bonds to be executed, and treating this suit as a proceeding to compel the company to carry out the resolution; whereas the real consideration is a security for the payment of the bonds of the company issued in conformity with the resolution. Though the deed does not state in terms, that the bonds had been executed, such is the plain inference from its provisions, and the fact is shown to be so. The object of the mortgage was to enable the company to dispose of its bonds advantageously in the market, by giving to the holders the security of a pledge of its property and profits. There can be no possible objection to the deed being made

to third persons as trustees for the benefit of the bondholders. It is in effect a contract between the company and all persons who might become holders of the bonds thereby secured, and they are entitled to the same benefit as if they were parties to the deed.

Several objections have been made to the provisions of the deed, which will be briefly noticed.

It is said the deed is void because it attempts to convey the *franchises* of the company, which are inalienable without the Legislative sanction.

The charter authorized the company to pledge "*its property and profits.*" We think the deed by a reasonable construction does no more, it conveys "all the present and future to be acquired property of the company and all its estate and franchises, that is to say," and then follows an enumeration of the property and rights intended to be conveyed. This enumeration limits and explains the previous words, and brings the terms of the deed within the limits of the legislative authority. But if it were construed otherwise, as intending to convey the franchise to be a corporation, while in that respect it would be inoperative, it is not for that reason entirely void, but operates to convey the property of the company.

The deed contains the following provision, "but nothing herein contained shall prevent the said company, before default in the payment of any of the said bonds, or the interest due thereon, from selling, hypothecating, or otherwise disposing of any of their said property, real or personal, not necessary in their judgment for the use of the said road, nor from collecting and applying any money due to the said company from any source whatever, provided said application shall not be to the prejudice of any holder of any of the said bonds."

This provision it is contended is fraudulent, and invalidates the deed. In answer to this objection we fully concur in the opinion of the learned Judge of the Circuit

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Court, and cannot do better than to repeat what has been so well said by him: "However suspicious the power here given might be in the case of a mortgage of ordinary goods, the very nature of this corporation, its business, the means and power necessary to keep it up, the wear and tear of its iron, ties and rolling stock, the constant necessity of replacing injured or worn out appurtenances with new, forbids the inference of a fraudulent purpose, which might arise from such a provision under other circumstances. The power retained is manifestly in the interest of the mortgagees, and is restricted by express language to be exercised in such manner as not to prejudice in any manner the rights of the bondholders. If the provision is in the interest of the bondholders, as it transparently is, it is also for the same reasons in the interest of the other creditors, and cannot be regarded as fraudulent."

We refer also on this point to the opinion of the late Judge STORER in *Ludlow vs. Hurd*, 1 *Disney*, 552, 561, 562, cited by the Judge of the Circuit Court.

It is next objected that the mortgage attempts to convey "*future to be acquired property*," but this objection is not tenable.

While it is well settled that a party cannot convey subsequently to be acquired goods, so as to give the mortgagee a legal title thereto, or a legal right of action against a party seizing them, as was decided in *Hamilton & Robinson vs. Rogers*, 8 *Md.*, 301, yet it has frequently been decided that such a conveyance creates in equity a valid lien upon property subsequently acquired. Many cases might be cited, we refer only to *Seymour vs. Canandaigua Falls R. R. Co.*, 25 *Barbour*, 285; *Morrill vs. Noyes*, 56 *Maine*, 458; *P., W. & B. R. R. Co. vs. Woelpper*, 64 *Pa. R.*, 366; and *Pennock, et al. vs. Coe*, 23 *Howard*, 117. The mortgage is, in our judgment, free from objection in its terms and provisions, it was made with the Legislative sanction, and appears to be in all respects such

a contract as was contemplated and authorized by the charter of the company.

2d. There can be no doubt of the privity of the lien of the bondholders, over that acquired by the appellant under the judgment. In disposing of this question it is immaterial to consider the effect of the decree authorizing the mortgage to be recorded in Somerset County. The appellant claiming as assignee acquired only the rights held by the National Iron Company. The proof shows conclusively that the N. I. Co. had notice of the mortgage as soon as it was executed. It was a part of the contract with that company, that the bonds should be issued and the mortgage executed to secure a portion of its debt, it was to that company the bonds were actually delivered, in fulfilment of the contract. It is therefore wholly immaterial that the mortgage was not recorded in Somerset County, till after the judgment was recovered. The N. I. Co. having notice of the mortgage when the debt was contracted and before the judgment was recovered must be postponed to the mortgage creditors; *Johnson vs. Canby*, 29 Md., 211; *Carson vs. Vickery*, 40 Md., 73; and the appellant as assignee, takes subject to all the equities affecting the original plaintiff in the judgment.

3d. When the original bill was filed and the injunction issued, the appellee's title to the bonds rested only on the allegation in the bill that he "had come into possession of them and now holds and owns the same." The Court might with propriety have refused to grant the injunction for the want of sufficient proof to support the allegation. But this objection cannot now be urged in support of the motion to dissolve; because the requisite proof has been supplied by the production of five of the bonds, and all the overdue coupons. But the title and ownership of the appellee is denied. It appears from the testimony that the "National Iron Company" procured the two promissory notes of the W. & S. Railroad Co. for \$12,500, before

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mentioned, to be discounted by the "Scranton Savings Fund and Trust Company" and hypothecated the railroad bonds as collateral security. These were afterwards sold at public auction, under the direction of the Trust Company, default having been made in paying the notes, and were purchased by William Painter, the witness, and were sold by him to the appellee. It is objected that the bonds having been held only as a pledge, could not be thus legally disposed of by the Trust Company, without notice to the Iron Company. The proof shows that the officers of the Iron Company were present at the sale, Painter the president, Cravelin the vice-president, and Welsh the treasurer, and that no objection to the sale was then made by the Iron Company; nor has any objection ever been made by that company; or by the railroad company; and the appellant claiming only under the Iron Company cannot be heard to object. In the absence of proof to the contrary the proceedings under which the bonds were sold will be presumed to have been regular; at all events the appellant is not in a position to question it. The possession of the bonds and *coupons* by the appellee, and their production in the cause is sufficient to give him a standing in Court, and to entitle him to relief. It is no valid ground of objection that some of the bonds have been pledged by him to other persons as collateral security, he has not thereby lost his title as owner, and is entitled to maintain this point for himself and all others having an interest as bondholders. *Mason vs. York & Cumberland Railroad Co.*, 52 *Maine*, 82; *Williamson, Trustee vs. New Albany & Salem R. Co.*, cited in 2 *Redfield on Railways*, 486, *note*.

The appellee being a bondholder, entitled to priority over the judgment creditor, there can be no question of the propriety of continuing the injunction. His right to this relief is shown by the cases before cited, especially by *Coe vs. Pennock*; *Mason vs. York & Cumberland R. Co.*; *Philadelphia, W. & B. R. Co. vs. Woelpper*; *Ludlow vs. Hurd*, and *State vs. N. C. R. Co.*, 18 *Md.*, 193.

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*In re Estate of James Stratton.*

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The exception to the bill as *multifarious* cannot be supported; this objection has not been made at the proper time nor in the proper form; but however made, the bill is not in our judgment, obnoxious to this objection.

The ruling of the Circuit Court upon the several exceptions of the appellant to the testimony are affirmed. We shall affirm the order, continuing the injunction, and remand the cause.

*Affirmed, and  
cause remanded.*

(Decided 13th June, 1877.)

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### In the Matter of the Estate of JAMES STRATTON.

*Practice in Orphans' Court—Jurisdiction to Correct Mistakes—  
Allowance of Commissions—Administration Accounts only  
Prima Facie Correct.*

Bonds returned in the inventory of a deceased person's estate but not appraised, cannot be considered as forming any such part of the inventory as requires the Orphans' Court to allow a commission upon them under the 5th section of Art. 93 of the Code.

The allowance of commission upon such bonds at their par value in an administration account, is a manifest error which can be corrected by the Orphans' Court while the administration is open and pending before it.

And the Court in making such correction does not exercise a constructive power prohibited by statute.

A reasonable time for the correction of such error is before the estate is finally closed.

The fact that such error is in an administration account which has been passed by the Court is immaterial.

Errors and mistakes in such accounts can as properly be corrected as in any order that may be improvidently passed.



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*In re Estate of James Stratton.*

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Administration accounts are only *prima facie* correct.

The Orphans' Court has unquestionably the power to allow administrators their commissions on the assets passing through their hands at various times as circumstances may require.

It is not necessary to ascertain the whole amount of an estate that will be subject to commission before any is allowed.

APPEAL of I. Thomas Jones, one of the administrators, from order of the Orphans' Court of Howard County.

The case is stated in the opinion of the Court.

The cause was submitted to BARTOL, C. J., BOWIE, BRENT, ALVEY and ROBINSON, J.

*I. Thomas Jones and Samuel Snowden*, for the appellant.

*Henry E. Wootten*, for the Board of County School Commissioners of Howard County.

BRENT, J., delivered the opinion of the Court.

In the inventory which was returned in this case on the 19th of October 1875, among other things returned, "thirteen one thousand dollar Logansport, Crawfordsville and Southwestern Railway Company (State of Indiana) first mortgage eight per cent. gold loan bonds of 1870," are set down as being "returned by us, (the appraisers) at their face value, we having no means of ascertaining their market value." Including these bonds at their face values of \$13,000, the inventory amounts to the sum of \$26,052.07. The first account of the administrators is passed on the 5th of July, 1876, and in it they are allowed by the Orphans' Court ten per cent. commission on the whole of this amount. On the 26th of November, 1876, a second administration account is passed showing a balance of \$23,191.68 in their hands due the estate. On the 19th

December following, the Orphans' Court passed an order modifying the sum upon which the commission is allowed in the first account, and deducting therefrom as the basis of commission the thirteen one thousand dollar bonds above referred to. In the same order they direct another warrant to issue for the appraisement of these bonds, and reserve the right of adjusting upon the passage of a final account, the amount of commissions to be allowed the administrators upon them. From this order the administrators have taken this appeal.

We do not see that the Orphans' Court was in error in passing this order, or that it is in any way inconsistent with the authorities cited by the appellants. It is manifest from the terms in which these bonds are mentioned in the inventory, that it was not the purpose or intention of the appraisers to affix to them any certain value. They have in fact not been appraised, and cannot be considered as they stand returned in the inventory, as forming any such part of it as required the Orphans' Court to allow a commission upon them under the 5th section of Art. 93 of the Code. The Court was therefore justified in directing, by their order of the 19th of December, a warrant to issue for their appraisement.

The allowance of commission upon them at their par value in the first administration account, is manifestly an error, and this could be corrected by the Court whilst the administration was open and pending before them. The argument that it is the exercise of a constructive power, which the Orphans' Court is prohibited by statute from exercising, is disposed of by the decisions of this Court. In the case of *Montgomery & Spencer, Ex'cs vs. Williamson*, 37 Md., 429, it is said "this objection is fully answered by the Court of Appeals in the case of *Roborg vs. Hammond*, 2 H. & G., 42, 51, in considering the power of the Orphans' Court to revoke letters of administration, when improvidently granted, and where to the

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*In re Estate of James Stratton.*

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exercise of the power the same objection was urged as to the jurisdiction in this case. The Court said, "But to this it may be answered, that we deem the power of revocation, under such circumstances, as necessarily inherent in the Orphans' Court, and a part, and of the essence of the power delegated to them, of granting administration. In confirmation of which, see 3 *Bac. Ab.*, 50, where, speaking of the ecclesiastical tribunals of England, in reference to this power, it is stated that "it would be absurd to allow a Court jurisdiction herein, and at the same time deprive them of the liberty of vacating and setting aside an act of their own, which was obtained from them by deceit or imposition. Whether the order of ratification was obtained by deceit and imposition is quite immaterial; if by honest mistake, the power of revocation and correction equally exists,—provided the application for its exercise be made within reasonable time and under proper circumstances." In the present case a reasonable time for the correction of the error is before the estate has been finally closed; especially if, as here, its correction is just to all the parties interested.

The fact that this error is in an administration account, which has been passed by the Court, is immaterial. Errors and mistakes in them can as properly be corrected as in any order that may be improvidently passed. As said in *Scott vs. Fox*, 14 *Md.*, 397, "It is a principle, settled beyond all doubt, that administration accounts are only *prima facie* correct. Their *ex parte* character imperiously requires they should be so. Errors in them have been repeatedly corrected, when made to appear, either in Courts of law or equity."

The Orphans' Court has unquestionably the power to allow the administrators their commission, upon the assets passing through their hands, at different times as circumstances may require. It is not necessary, nor can it always be done, to ascertain the whole amount of an estate

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Hill vs. Reifsnider, et al.

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that will be subject to commission, before any is allowed. The Court in this case could therefore properly allow a commission upon a part of the assets, and retain for adjustment in a subsequent account of the administrators, the allowance upon the bonds in question, after their value had been ascertained by a proper appraisement.

Concurring with the Orphans' Court in their authority and power to pass the order from which this appeal is taken, it will be affirmed.

*Order Affirmed.*

(Decided 13th June, 1877.) .

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JOHN T. HILL vs. CHARLES T. REIFSNIDER, and  
THEODORE L. FRITCHEY and WILLIAM B. THOMAS.

*Nature of proof required to set aside or interfere with a judgment on the ground of fraud—Adequate defence at law—  
Fraud, surprise or mistake—Correction of a judgment affected with usury.*

Fraud is never presumed, and to justify a Court of equity in setting aside or in any manner interfering with a judgment on this ground, the fraud must be clearly and conclusively established.

The burden of proof is on the complainant to prove his case as it is alleged by the bill, and circumstances of mere suspicion will not warrant the conclusion of fraud.

A Court of equity will not restrain the execution of a judgment, unless it shall appear, that the complainant had a valid defence of which he could not have availed himself at law, or of which he might have availed himself, but was prevented by mistake, surprise or fraud unmixed with any fault or negligence of his own.

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*Hill vs. Reifsnider, et al.*

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On a bill filed to restrain the execution of a judgment on the ground of fraud, it was **HELD** :

1st. That the complainant had not made out a case entitling him to have the judgment set aside.

2nd. That inasmuch as there appeared to have been usurious charges against him in the transactions between him and the defendants, he was entitled to have the judgment reduced to the sum found to be due by charging him with the net amount loaned him, and the average interest thereon, and allowing him for the amount of credits to which he was entitled, including bonus and interest on bonus.

3rd. That although it was quite probable that this method did not ascertain the precise amount of usury paid by the complainant, yet no more could be allowed him, as there was no proof in the record to justify the Court in allowing any more, owing to the defective manner in which the complainant had kept his accounts, and his own forgetfulness of matters material to their elucidation.

**APPEAL** from the Circuit Court for Carroll County, in Equity.

The original bill in this case was filed by the appellant, John T. Hill against Charles T. Reifsnider, for an injunction to restrain the executor of a judgment confessed by the former in favor of the latter, and by him subsequently assigned to the appellees, Fritchey & Thomas. It having been decided by this Court (*Hill vs. Reifsnider*, 39 Md., 429,) that Fritchey & Thomas were necessary parties. An amended bill was filed making them parties, and calling on them for a discovery under oath of the transactions between themselves and the complainant.

A great mass of documentary and oral testimony was taken in the case, the nature of which is sufficiently stated in the opinion of the Court.

The exhibits Nos. 26 and 27 referred to in the opinion of the Court are as follows :

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Hill vs. Reifsnider, et al.

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*Exhibit F. & T. No. 26.*

John T. Hill,

	In acc. with T. L. Fritchey & Co.,	CR.
Feby. 12th, 1869.	Bonus on \$400 for 60 days... \$	24 00
	Int. for 3 years and 6 mos. and 8 days,.....	5 07
June 24th, 1869.	Extension charged on \$400	24 00
July 20th, 1869.	Extension and bonus 3/4....	30 00
	Int. for 3 years and 1 mo..	5 55
Aug. 26th, 1869.	By cash.....	150 00
	Int. for 2 years, 11 mos. and 24 days.....	26 85
Nov. 25th, 1869.	Extension on \$400, and bal. \$80 .....	47 31
	Int. for 2 years, 8 mos. and 25 days.....	7 71
April 5th, 1870.	Do. ....	2,746 80
	Int. for 2 years, 4 mos. and 15 days .....	391 45
12th, 1870.	Bonus on \$500 for 90 days	45 00
	Int. for 2 years, 4 mos., 8 days.....	6 36
June 27th, 1870.	Bonus on \$350 for 60 days	21 00
	Int. for 2 years, 1 mo. and 24 days.....	2 71
August 6th, 1870.	Extension and bonus.....	34 50
	Int. for 2 years and 14 days	4 28
Oct. 8th, 1870.	Bonus on \$50 note.....	1 00
	Int. for 1 year, 10 mos. and 12 days.....	11
Oct. 27th, 1870.	By funding and bonus.....	1,109 70
	Int. for 1 year, 9 mos. and 24 days.....	120 99
Amount carried forward.....		\$4,804 39

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	Amount brought forward.....	\$4,804 39
Nov. 29th, 1870.	Bonus charged on \$265.90.	15 90
	Int. for 1 year, 8 mos. and 22 days.....	1 66
Mch. 14th, 1871.	Funding and bonus.....	400 60
	Int. 1 year, 5 mos. and 6 days.....	34 49
Mch. 31st, 1871.	Bonus.....	73 00
	Int. for 1 year, 4 mos. and 20 days.....	6 08
April 11th, 1871.	Bonus on notes \$327.....	27 00
	Int. for 1 year, 4 mos. and 9 days.....	2 20
Sep. 8th, 1871.	Do. ....	4,948 87
	Int. for 11 mos. and 12 days	282 10
Jan. 27th, 1872.	Order and dict.....	52 47
	Int. for 6 mos. and 24 days	1 77
Mch. 19th, 1872.	Funding and discounts....	5,563 11
	Int. for 5 mos. and 1 day.	140 01
April 8th, 1872.	Discounts \$1,000 for 10 days.....	10 00
	Int. for 4 mos. and 12 days	22
June 1st, 1872.	Discount on \$251.25.....	1 25
	Int. for 2 mos. and 19 days	01
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	(\$16,369.67.)	<u>\$16,369 67</u>

Hill vs. Reifsnider, et al.

Exhibit F. &amp; T., No. 27.

DATE.	GROSS AMT.	NET AMT.	INT. ON NET.	BONUS.	INT. ON BONUS.	TIME ON WHICH INT. WAS CALCULATED.
Feby. 12, 1869,	400 00	376 00	79 46	24 00	5 07	3 years, 6 mos. and 8 days.
July 20, 1869,	230 00	224 00	41 48	6 00	1 11	3 years, 6 mos. and 31 days.
Apl. 5, 1870,	250 00 }					
5, 1870,	2,000 00 }	2,250 00	320 63	6 00	1 11	2 years, 4 mos. and 15 days.
12, 1870,	500 00	455 00	64 31	45 00	6 36	2 years, 4 mos. and 8 days.
June 27, 1870,	350 00	329 00	42 45	21 00	2 70	2 years, 1 mo. and 24 days.
Aug. 6, 1870,	150 00	145 50	17 74	4 50	61	2 years and 14 days.
Oct. 8, 1870,	51 00	50 00	5 60	1 00	11	1 year, 10 mo. and 12 days.
27, 1870,	109 70	103 50	11 34	6 20	65	1 year, 9 mo. and 24 days.
Nov. 29, 1870,	265 90	250 00	25 92	15 90	1 66	1 year, 8 mo. 22 days.
Mch. 14, 1870,	660 00	642 75	55 19	17 25	1 47	1 year, 5 mo. and 6 days.
31, 1870,	1,000 00	940 00	78 33	60 00	5 00	1 year, 4 mo. and 20 days.
31, 1870,	453 18	440 18	36 67	13 00	1 08	1 year, 4 mo. and 20 days.
Apl. 11, 1871,	327 00	330 00	24 45	27 00	2 20	1 year, 4 mo. and 9 days.
Sept. 8, 1871,	2,000 00	1,750 00	99 75	250 00	14 25	11 mo. and 12 days.
8, 1871,	3,982 52	3,938 35	224 55	44 17	2 51	11 mo. and 12 days.
28, 1871,	90 00	87 00	4 69	3 00	16	10 mo. and 23 days.
Oct. 9, 1871,	15 00	15 00	78	.....	.....	10 mo. and 11 days.
14, 1871,	20 00	20 00	1 02	.....	.....	10 mo. and 6 days.



Hill vs. Reifsnider, et al.

Exhibit F. &amp; T., No. 27.—Continued.

DATE.	GROSS AMT.	NET AMT.	INT. ON NET.	BONUS.	INT. ON BONUS.	TIME ON WHICH INT. WAS CALCULATED.
Nov. 13, 1871,	230 30	230 30	10 62	.....	.....	9 mo. and 7 days.
20, 1871,	200 30	200 30	9 00	.....	.....	9 mo.
Dec. 6, 1871,	13 00	13 00	54	.....	.....	8 mo. and 14 days.
Jan. 25, 1872,	43 85	43 85	1 50	.....	.....	6 mo. and 25 days.
Feb. 2, 1872,	152 57	143 95	4 90	8 62	30	6 mo. and 24 days.
27, 1872,	15 35	15 35	50	.....	.....	6 mo. and 18 days.
Mch. 8, 1872,	400 00	400 00	11 60	.....	.....	5 mo. and 24 days.
18, 1872,	142 00	142 00	3 83	.....	.....	5 mo. and 12 days.
19, 1872,	116 56	116 56	2 97	.....	.....	5 mo. and 2 days.
19, 1872,	100 00	100 00	2 52	.....	.....	5 mo. and 1 day.
19, 1872,	6,466 31	6,400 48	161 07	65 83	1 66	4 mo. and 12 days.
Apl. 8, 1872,	1,000 00	990 00	21 78	10 00	22	4 mo. and 12 days.
22, 1872,	24 00	24 00	47	.....	.....	3 mo. and 28 days.
May 6, 1872,	10 00	10 00	17	.....	.....	3 mo. and 14 days.
June 1, 1872,	251 25	250 00	3 29	1 25	01	2 mo. and 19 days.
18, 1872,	264 70	264 70	2 74	.....	.....	2 mo. and 2 days.
	\$22,284 49	\$21,660 77	\$1,371 84	\$623 72	\$47 13	

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Hill vs. Reifsnider, et al.

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The Court below, (MILLER, HAMMOND and HAYDEN, J.,) decreed, "that the injunction heretofore granted in this case, be, and the same is hereby made perpetual in so far as to restrain execution of the judgment therein mentioned, to the extent of one thousand three hundred and thirty-seven dollars and six cents, (\$1337.06,) and the same is hereby dissolved, in so far as it restrains execution of said judgment to the extent of six thousand six hundred and sixty-two dollars and ninety-four cents, (\$6662.94,) with interest thereon from the date of said judgment.

"And it is further adjudged, ordered and decreed, that the costs of this case, to be taxed by the clerk, be paid one-half by the complainant and the other half by the defendants, Fritchey & Thomas."

From this decree the complainant appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT and ROBINSON, J.

*Charles Marshall*, for the appellant.

*Wm. M. Merrick*, for the appellees.

ROBINSON, J.. delivered the opinion of the Court.

In this case the appellant seeks to restrain the execution of a judgment on the ground of fraud, and also prays for a discovery on oath as to the dealings between Fritchey & Thomas and himself prior to and up to the rendition of the judgment.

There seemed to be no difficulty whatever as to the right of the complainant to the relief prayed, provided the proof was sufficient to sustain the allegations in the bill. But fraud is never presumed, and to justify a Court of equity in setting aside, or in any manner interfering with a judgment on this ground, the fraud must be clearly and conclusively established. The burden of the proof is upon

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the complainant to prove his case as it is alleged by the bill, and circumstances of mere suspicion will not warrant the conclusion of fraud. In this case the proof on the part of the complainant rests mainly on his own testimony, and this is flatly contradicted in every essential particular by that of the respondents.

The undisputed facts show there had been moneyed transactions between the complainant and Fritchey & Thomas, extending over a period of several years, and amounting in the aggregate to over twenty thousand dollars, and that upon an adjustment of accounts between them, the complainant executed a promissory note in their favor for eight thousand dollars.

On the same day Reifsnider, according to the testimony of the respondents, at the request of Fritchey & Thomas, and for their accommodation, agreed to loan to them eight thousand dollars, provided the complainant would execute a note to him, Reifsnider, for that amount, with power of attorney to confess a judgment thereon with a stay of thirty days. In pursuance of this agreement the note of the complainant to Fritchey & Thomas was surrendered, and a note to Reifsnider substituted in its place, and it is the execution of the judgment confessed on this note that the complainant now seeks to restrain. We find no proof in this record to satisfy our minds that either the notes or judgment was obtained by fraud. On the contrary, the weight of testimony shows that the complainant was largely indebted to Fritchey & Thomas, the precise amount of which we shall have occasion hereafter to consider, and however suspicious some of the circumstances surrounding the transaction may appear, yet they are not sufficient to justify the conclusion that the intervention of Reifsnider was a fraudulent device on the part of the respondents for the purpose of covering up and concealing the illegal and usurious charges of Fritchey & Thomas. So far, then, as Reifsnider is concerned, he must be regarded as the *bona*

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*fide* holder of the judgment, which he subsequently assigned to Fritchey & Thomas.

The complainant having failed to make out a case to justify this Court in setting aside the judgment on the ground that it was obtained by fraud, the question is what relief, if any, is he entitled to? And here we are met by the well settled law of this State, that a Court of equity will not restrain the execution of a judgment unless it shall appear that the complainant had a valid defence of which he could not have availed himself at law, or of which he might have availed himself, but was prevented by mistake, surprise, or fraud, unmixed with any fault or negligence of his own. *Gott vs. Carr*, 6 G. & J., 309; *Prather vs. Prather*, 11 G. & J., 110; *Kearney vs. Sascor, et al.*, 37 Md., 279.

Now, the proof entirely fails to bring this case within these well established rules of law. The testimony of the complainant in regard to what occurred at the time of the execution of the note to Reifsnider is contradicted in every particular by the testimony of the respondents, and although he is now seeking the aid of a Court of equity to restrain the execution of a judgment voluntarily confessed, he has failed to show that, exclusive of charges for usurious interest, he had any other defence to make. He seems to have kept no account, and made no memoranda of the transaction he now assails. In the language of the learned Judge, "he displays in his testimony an ignorance or want of recollection of important matters about which he ought not to have been ignorant, and which he ought to have borne in memory if he expected success in thus invoking the aid of a Court of equity."

The only relief, then, to which the complainant is entitled is an allowance for the excessive and usurious rates of interest charged by Fritchey & Thomas and which made up in part the eight thousand dollars claimed to be due to them. And in endeavoring to ascertain the precise amount

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to which the complainant is entitled in this respect, we have encountered the same difficulties which the Judge below, the counsel for the appellant, and, in fact, every one connected with this case, have experienced. The complainant has failed to furnish us with any satisfactory data from which it could be ascertained, and we have been left to find it as best we may from the confused and complicated dealings and transactions between the parties.

It was contended, however, that exhibits Nos. 26 and 27, which Fritchey & Thomas admitted contained a correct statement of the dealings between the parties, prove that the complainant is entitled to \$1371.84 in addition to amount allowed to him by the decree below.

But in reaching this result, the counsel for the appellant credits Fritchey & Thomas only with the nett amount which they admit was loaned to complainant, namely, the sum of \$21,660.77, whereas they were undoubtedly entitled to the average interest on this indebtedness, making, in addition thereto, \$1371.84, and the total indebtedness of the complainant, \$23,032.61. Now, deduct from this the amount of credits to which he is entitled, according to exhibit No. 26, including bonus and interest on bonus, to wit, \$16,369.67, and we have the sum of \$6662.94, being the amount due Fritchey & Thomas on the 20th August, 1872. This, deducted from \$8000, the amount for which the complainant gave his promissory note and confessed judgment thereon, and we have \$1337.06, the precise amount allowed by the Judge below on account of usury. Now, it is quite probable that this sum does not represent the precise amount paid by the complainant, for the record shows that Fritchey & Thomas demanded no less than thirty-six per cent. per annum, but there is no proof in the record to justify us in allowing any more. If not enough, the complainant has no one to blame but himself.

*Decree affirmed.*

(Decided 13th June, 1877.)

## JOSEPH KELLER vs. PHILIP B. KUNKEL.

*Statute of Frauds—Parol Evidence—Resulting Trust.*

An agreement in relation to lands, and tending to create a trust in relation thereto, cannot be proven by parol evidence, because it would be contrary to the 7th section of the Statute of Frauds.

A resulting trust arises when one person buys an estate and pays the purchase money, but takes the deed in the name of the other person, in which case the trust results by construction in favor of the person who paid the money.

The bill alleged that the complainant bought of H. and others, as trustees, at public auction, a tract of land. That not having the money to pay for it, he borrowed the amount of the defendant upon certain collateral securities; which having been paid or advanced by the defendant for him, he caused the deed for certain other considerations to be made to the defendant instead of himself. **HELD :**

1st. That here all the conditions necessary to raise a resulting trust concurred.

2nd. That if these facts were proved by parol, as they might be, a trust resulted by implication of law in favor of the person purchasing and paying.

The evidence showed that the purchase money paid to the trustee was loaned to the complainant by the defendant, and was paid by the defendant as agent for the complainant and for his use. **HELD :**

That the purchase money being thus advanced by the complainant through the defendant, the latter was a trustee of the former of the premises conveyed to him.

**APPEAL** from the Circuit Court of Frederick County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, BRENT and ROBINSON, J.

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*F. J. Nelson and J. E. R. Wood*, for the appellant.

*Francis Brengle*, for the appellee.

BOWIE, J., delivered the opinion of the Court.

The appellant filed his bill of complaint in the Circuit Court for Frederick County, Md., sitting in equity, against the appellee, to compel him to account for certain moneys alleged to have been collected and received for the appellant's use, and to execute and deliver to appellant a deed for certain real estate, purchased by appellant (and paid for by him with money borrowed of the appellee,) and conveyed to said appellee in secret trust for appellant. The allegations of the bill, as far as they relate to the questions raised by this appeal, are substantially as follows:

About the 22d of October 1864, William C. Hoffman and others, as trustees, sold at auction, a parcel of land lying in Frederick County, described in complainant's Exhibit A, for the sum of \$580, to the complainant, who not having the ready money to pay for the same, agreed with the appellee, "if he would advance the same for the appellant, the appellant would deliver the appellee sundry collateral securities hereinafter specifically set forth, as an indemnity for such advance, and that the appellant would procure the conveyance of the land to be made to the appellee, to be held by him until the advance should be repaid, or the amount realized from said collateral securities, by the appellee; in pursuance of said agreement, and to prevent appellant's wife (with whom he was then on bad terms) from acquiring a potential right of dower in the premises, a deed of conveyance was made by the said Hoffman and others, to the appellee, of said land on the 26th of October 1864, which is duly recorded; the appellee furnished the purchase money, and the appellant thereupon delivered to him the securities as indemnity therefor, with full power by endorsements and assign-

ments to collect the same." On payment by the appellant to the appellee, or the realization of the same, by the latter, from the security, it was agreed that the latter should convey to the former the premises described in Exhibit A.

The bill charged a similar agreement between the appellant and appellee, in respect to an undivided interest in a tract of land described in Exhibit B, in payment for which the appellee advanced \$400, and agreed to convey the same to appellant upon payment of the same; but afterwards sold the same at a great advance, and retained the proceeds.

The bill charged that the appellee had collected large sums from the collateral securities endorsed and assigned to him, whereby he was fully reimbursed the sums loaned to him, and prayed relief as above. The appellee, by his answer, denied the truth of the charges contained in the bill, as therein charged, but averred that whilst he purchased the two premises mentioned in the bill, to all intents and purposes, as his own property, he was willing to sell and convey the same to appellant, on payment of the amount of the purchase money, which appellee had paid therefor, with interest from the date of purchase, and that after he became purchaser he endeavored to aid the appellant in raising the purchase money which he was to pay the respondent; he denied the endorsement and assignment of the securities as indemnity on collateral security, or any agreement to accept them as such, or any agreement to convey the premises described in Exhibit A, as alleged, etc.

The appellee averred that the appellant never in fact paid one dollar on account of said purchase money; and that all the understandings and arrangements were *by parol*, and failed of execution because of the failure of the appellant to execute the same on his part, and to pay the purchase money, and he is advised that all the arrange-



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ments, etc., were absolutely without effect in law and equity, and the appellee also relied on the Statute of Limitations.

To the defendant's answer a general replication was filed.

Evidence was taken under commission duly issued, executed and returned, in support of the bill and answer. Exceptions were filed to portions of the evidence on each side.

After argument, the Court below decreed the complainant's bill should be dismissed, with costs. The grounds of the Court's decision, as indicated by its opinion, and which are relied on by the appellee for its affirmance, are,

1st. That the averments of the bill do not show a resulting trust, which arises where one person buys an estate, and pays the purchase money, but takes the deed in the name of another person, then the trust results by construction in favor of the person who paid the money.

"The agreements, or facts relied on in this case, are not manifested or proved by any writing, but rests wholly on parol. They set out a trust (or as the books call it, a conventional trust) in relation to lands, and being denied by the answer, the complainant alleging the agreement, must, to sustain it, produce such proof as will satisfy the requirements of the Statute of Frauds."

The bill and all the testimony in this case, (even if admissible) show only a parol agreement, between parties in relation to lands, and tend to create a trust in relation thereto. This cannot be shown by parol evidence, because it would be contrary to the 7th section of the Statute of Frauds and Perjuries, which provides that "all *declarations* or creation of trust and confidence of any lands, etc., shall be manifested and proved by some writing by the party who is by law enabled to declare such trust."

In other words, the complainant's bill does not show a case of a trust arising by operation of law, otherwise called a "resulting trust," but it does show in connection

with the testimony, a verbal agreement in relation to lands, tending to create a trust in relation thereto, contrary to the 7th section of the Statute of Frauds.

There is no question as to the correctness of the general principles announced by the Court below, as governing trusts arising from operation of law, known as "resulting trusts," and trusts arising from the agreement of the parties, known as "conventional trusts." The Court below, in their opinion above cited, admit the distinction, and the appellants concede it, but they contend that the allegations of the bill clearly constitute a case of resulting trust, and the evidence as clearly establishes the case made by the bill.

It is of the first importance, therefore, to determine to which of these classes the case made by the bill belongs, as the competency, as well as sufficiency of the testimony, to maintain the allegations will be governed by the result.

The Court below have very correctly defined a resulting trust to be that "which arises where one person buys an estate and pays the purchase money, but takes the deed in the name of another person, then a trust results, by construction, in favor of the person who pays the money."

The same definition is substantially given in *Hays vs. Hollis*, 8 Gill, 357; 1 Md. Ch. Dec., 479; *McElderry vs. Shipley, et al.*, 2 Md., 36, 37.

Divested of all superfluous words, the bill charges that the appellant bought of a certain William C. Hoffman and others, as trustees, at public auction, a tract of land at and for the sum of \$580; that, not having the money to pay for it, he borrowed the amount of the appellee upon certain collateral security; which, having been paid by appellee, or advanced for him, he caused the deed, for certain other considerations, to be made to the appellee instead of himself.

Here all the conditions necessary to raise a resulting trust seem to us to concur.

Here is the purchase and payment by one party and the conveyance to a third.

If these facts are proved by parol, as they undoubtedly may be, there can be no question a trust results, or arises by implication of law, in favor of the person purchasing and paying.

This necessarily leads to a brief investigation of the testimony on the subject of the sale of the property described in Exhibit A, and the execution of the deed to the appellee.

Both appellant and appellee have testified in support of their respective pretensions, and, as usual in such cases, the evidence of one neutralizes that of the other.

There are, however, disinterested witnesses, and certain facts, proved here and there, which give a decided preponderance to the weight of the appellant's testimony.

Wm. C. Hoffman, one of the trustees who sold the property, testifies it was bid in by Jos. C. Keller; that Keller gave him a written order, which was produced and proved, dated Frederick, 16 October, 1864, requesting and empowering him, Hoffman, to deed the property bought of him by Keller to the appellee.

As to the payment for the land, Hoffman deposes: "I think it was paid by Philip B. Kunkel's check."

Hoffman expressing surprise at Kunkel's paying for the property, the latter told him that Keller had given him claims as collateral security. The receipt of W. C. Hoffman, trustee, is produced and proved as follows:

Received, October 26, 1864, of Philip B. Kunkel, a check for five hundred dollars, and eighty dollars in bank notes, as payment in full for six acres, two roods, and twenty-two perches of land, the real estate of James Hilleary, sold by me as trustee for the heirs.

W. C. HOFFMAN, Trustee.

On the day of this payment, Kunkel charges Keller, in his ledger, with \$500 paid Hoffman. It is thus demon-

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strated that \$500 was paid by Kunkel to Hoffman on Keller's account. The money advanced or loaned by Kunkel to Keller was as much the money of the latter as if he had earned it day by day.

There is sometimes great difficulty in determining whether a case is one of trust arising merely by operation of law, or whether it is one created by the agreement of the parties.

The case of *Bartlett vs. Pickersgill*, cited in 4 *East*, 579, furnishes an example.

This Court, in the case of *Dorsey vs. Clarke*, 4 *H. & J.*, 557, referring to that case, say: "Where a man employs an agent by parol to buy an estate, who buys it accordingly, and no part of the consideration is paid by the principal, and there is no written agreement between the parties, he cannot compel the agent to convey the estate to him, as that would be in the teeth of the statute."

That was the character of the case of *Dorsey vs. Clarke*. The complainant alleged that Dorsey had purchased the land at sheriff's sale, and when he became the purchaser and received the sheriff's deed it was expressly agreed by and between Yeildhall and Dorsey, that the land was only to be held by Dorsey as security for the money advanced by Dorsey, and that he would reconvey the same at any time upon payment of the money so advanced, etc.

There was no note or memorandum in writing of the above agreement. The complainants sought to supply the absence of proof in writing by producing entries from the books of Dorsey in his own hand-writing, which were admitted in evidence. These were as follows:

"1807, March 9th. Cash paid to Sheriff and other expenses on Benjamin Yeildhall's property, bought by me..... \$316

"To one year's rent, due and ending 9th of March, 1808.....£7 2 2½

"1808, May 6th. By cash..... 3 15 0

June 4th. By cash..... 3 15 0"

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Referring to these, this Court said: "Neither do the entries from the books of Dorsey establish the facts that the purchase money was loaned by Dorsey to Yeildhall. *Yeildhall is not made debtor for the same, and the entries are such as any purchaser might make with a view of showing his disbursements and the state of his property.*" *Ibid*, 557.

If the books of Dorsey had shown, in the judgment of the Court, that the purchase money was loaned by Dorsey to Yeildhall, the inference is almost irresistible that this Court would in that case have declared the transaction a resulting trust.

In this case, the appellee's books do show that he had charged the appellant with the amount of \$500, paid Hoffman on the same day that the latter receipted to the appellee for the sum of \$580, as payment in full for the land.

The receipt of Hoffman, trustee, corresponds in many particulars with the entries in the appellee's books, and confirms the testimony of the appellant in relation to the loan.

The receipt is for "a check for five hundred dollars, and eighty dollars in bank notes."

The exhibit P. B. K. charges Keller same day, "to cash, Hoffman, \$500."

On the 15th October 1864, the appellant is credited, "By cash of him this date, eighty (\$80.00)."

Mr. Kunkel, in his answer to the eleventh interrogatory in chief, testifying in his own behalf, says: "I haven't got the property charged, but I charged him (meaning the appellant) with the purchase money, five hundred dollars (\$500,) the entry October 26th 1864. Cash Hoffman and the entry November 19 1864, 'to cash house on Patrick street,' refer to the property described in exhibits A and B respectively; my ledger, in these transactions, is my book of original entry, and exhibit P. B. K. No. 1 is a true

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copy of my ledger and a true copy of my account with Joseph C. Keller."

The entries above cited, taken with the receipt and explanations given by Kunkel and Keller, prove conclusively, in our opinion, that five hundred dollars of the purchase money paid to Hoffman was loaned by Kunkel to Keller, and paid by Kunkel, as agent for Keller, and for his use, and that the purchase money being thus advanced by Keller, through Kunkel, the latter is a trustee for the former of the premises described in Exhibit A.

The decree appealed from will be reversed and the cause remanded for further proceedings, in conformity with the views expressed in this opinion.

*Decree reversed, and  
cause remanded.*

(Decided 13th June, 1877.)

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MICAJAH P. SMITH and ELIZA JANE SMITH, his  
Wife, and others vs. CHARLES F. SHAFFER.

*Bill to enforce mechanics' lien—Prior encumbrancer not a proper party—Effect of statements in opinion in the Court below, where the record on appeal does not contain the Evidence—Terms of decree for sale in mechanics' lien case—Decree in rem and decree in personam.*

On a bill filed to enforce a mechanics' lien for lumber used in the erection of a building, at the request of the contractor, the mortgagee under a mortgage of prior date to the mechanics' lien, was made a party defendant, but did not answer the bill. A decree was passed by the Court below for the sale of the property. On appeal, it was **Held**:

1st. That the mortgagee was improperly made a party, and the decree should not have been passed against it.

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2nd. That a sale of the property to pay the mechanics' lien must be had subject to the prior encumbrance, unless the encumbrancer came in and consented to be made a party.

There appeared to have been three separate deliveries of materials, but whether upon a continuous contract or separate contracts, did not appear from the proof. In the opinion filed by the Judge of the Court below, it was stated that the notice was duly given, and that "the sale and delivery of the lumber is fully shown" **Held:**

1st. That as the record contained none of the proof taken, the statement of the Judge as to what was proven before him was conclusive.

2nd. That upon said appeal the materials must be considered as having been delivered under one continuing contract, and the notice as being in time to cover all the items charged in the bill of particulars.

3rd. That the decree was informal, because it did not ascertain the amount of the lien claim for materials furnished; and because it allowed no day before the sale for its payment.

4th. That although the decree in the case must be *in rem* and not *in personam*, yet its character was not changed by directing a sale, unless the amount found due was paid before a day named.

**APPEAL** from the Circuit Court for Prince George's County in equity.

The bill in this case was filed by the appellee to enforce a mechanics' lien, for lumber furnished in the construction of a house. The parties made defendants were the owner of the property and her husband, and the contractor for the erection of the building, and the mortgagee under three several mortgages, one of which was prior to the lien of the complainants, and the others subsequent to it. No answer was filed by the mortgagee. The Court below (MAGRUDER, J.,) passed a decree for a sale of the property, the nature of which is sufficiently stated in the opinion of the Court. From this decree the present appeal is taken.

The cause was argued before BARTOL, C. J., BOWIE, BRENT and ROBINSON, J.

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*Joseph K. Roberts, Jr.*, for the appellants.

It was error to decree a sale without first ascertaining and determining the extent or amount of the lien. The Court should have fixed a time within which the lien-claim so ascertained should be paid.

Art. 61, sec. 25, Code: "If the proceeding is by bill in equity, the same proceedings shall be had as are used by the Courts of equity to enforce other liens."

Art. 16, sec. 125: "When any suit is instituted to foreclose a mortgage the Court may decree that unless the debt and costs be paid by the time fixed by the decree the property shall be sold;" and the appellants contend that that is the uniform practice and proceeding in Courts of equity in all cases of lien.

The bill to enforce a mechanics' lien-claim is analogous to a foreclosure of mortgage. *Hubbell vs. Schreyer*, 14 *Abbott Practice*, (N. S.,) 284; *Deming vs. Patterson*, 10 *Ind.*, 253.

Nor can it be contended that this, being in the nature of a proceeding in *rem*, would be an improper form of decree; it is expressly held in *Wood vs. Fulton*, 2 *H. & G.*, 71, that such a decree is a *decree in rem*.

In *Wylie vs. McMakin*, 2 *Md. Ch. Dec.*, 413, the Court say, on a bill for a foreclosure sale where the claim is not admitted, or where there is difficulty in fixing upon the *precise sum by the payment of which the defendant might prevent a sale*, the case *must* be referred to the auditor for a preliminary account before a final decree.

In this case the decree does not adjudge that the whole of the claimant's lien is sustained or any particular sum is due

The Code required notice to be given to the owner within sixty days from the furnishing of the materials. *Art. 61, sec. 11.*

This was not a continuous or entire contract; each purchase was separate and distinct. There was no contract to



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furnish all the materials; but, as alleged in the lien "it is for furnishing, selling, and delivering materials between March 1st and April 21st, 1875, at prices stated in bill of particulars."

And the sixty days limitation applies to each item from the date of its delivery. *Hubbell vs. Schreyer*, 14 *Abbott, N. S.*, 284; *Ortwine vs. Caskey & Thomas*, 43 *Md.*, 135; *Spencer vs. Barnett*, 35 *N. Y.*, 94.

*Charles H. Stanley*, for the appellee.

The appellants not having ordered in the record the evidence, the Court above must, in this case, consider the evidence in the case below to have been sufficient to justify the decree or judgment of the Court, and must presume that the necessary proceedings, other than those shown by the record, were had prior to decree; and the appellants must make the contrary appear from the face of the record, the decree stating that the bill, answer, evidence, and all other proceedings, were read and considered. *Hallowell & Co. vs. Miller*, 17 *Md.*, 308; *Reynolds vs. Negroes Juliet, et al.*, 14 *Md.*, 120.

That the bill is sufficient in form and substance. The lien contains all that is required by section 19 of Article 61, and was filed within the time required by law and in the proper office.

That the notice is sufficient in form and substance, and is the legal notice required by section 11, Article 61 of the Code; a list of materials, dates, prices and sum total having been appended to the same; this being a case under section 11 of Article 61, Code of Public General Laws. *Jarden and Wife vs. Pumphrey*, 36 *Md.*, 361.

The decree is in proper form. This is a special statutory proceeding, and is to be maintained and enforced to the extent and in the mode prescribed. The decree directs a sale, and orders the trustee to bring the money into Court, leaving it to the auditor's accounts to settle the priorities of

the parties. *Code Public Gen. Laws, Art. 61, sec. 25; Sodini & Leiter vs. Winter, et al., 32 Md., 130.*

Sec. 125 of Art. 16, Code, only applies to proceedings brought by the mortgagee, or his representatives *vs.* mortgagor, or his representatives.

The fact that mortgagees are parties defendants does not make it apply, as there is no mortgagee party complainant. *Gibson, et al. vs. McCormick, 10 G. & J., 65; Art. 16, sec. 125; Act of 1876, ch. 327; Reese & Fisher vs. Bank of Commerce, 14 Md., 271.*

The mechanics' lien is a specific lien on only a portion of the land, and the lien claimant is not to be delayed in the remedy given him by statute, by giving time to the mortgagors to pay off all the liens. He must, as far as the owner is concerned, make his money out of the ground and buildings designated, subject to prior encumbrances, or lose it.

Time need not be given to pay the lien in the decree.

The decree is a decree *in rem*, and could be under no circumstances a decree *in personam* as against the appellants, the owners. The appellee is entitled to a sale of this specific property as designated to satisfy his lien, as against the appellants he can look to it alone, or the contractor.

The Court had the right to prescribe the terms of sale. *Reese & Fisher vs. Bank of Commerce, 14 Md., 271; Code, Art. 16, secs. 130 and 132.*

It is also contended that a decree should not be reversed for mere form, when the appellants fail to show it has worked an injury, and that it is incumbent on the appellants to show from the record a case for reversal, and that an injury has been done them.

BRENT, J., delivered the opinion of the Court.

The record in this case discloses some irregularities, which prevent an affirmance of the decree.

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The mortgage to the Independent Savings and Building Association of Laurel, dated the first of December, 1874, is a lien of prior date to the mechanics' lien, for the enforcement of which the bill of complaint is filed. It is objected that this association is improperly made a party to this proceeding, so far as this mortgage is concerned, and that the decree should not have been passed against them. We think the objection is well taken. They do not seem to have answered the bill, and as prior mortgagees, the decree is improvidently passed against them. The sale of the property to pay the mechanics' lien must be had subject to this prior encumbrance, unless the encumbrancer comes in and consents to be made a party.

It is also objected that the notice of the lien is not in time so far as some of the materials mentioned in the bill of particulars are concerned. There seems to have been three separate deliveries of materials, but whether upon a continuous contract, or separate contracts, does not appear from any proof in the record. The learned Judge of the Circuit Court, in the opinion filed by him, says that the notice was duly given, and that "the sale and delivery of the lumber is fully shown." As the record contains none of the proof taken, the statement of the Judge as to what was proven before him is conclusive. Upon this appeal, therefore, the materials must be considered as having been delivered under one continuing contract, and the notice as being in time to cover all the items charged in the bill of particulars.

The decree is informal in two respects. It does not ascertain the amount of the lien for materials furnished, and allows no day before the sale for its payment.

If the latter is proper, an ascertainment of the amount due is a necessary pre-requisite. It is true the decree in this case must be *in rem*, and cannot be *in personam*, yet its character is not changed by directing a sale, unless the amount found due is paid on or before a day named. It is

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nevertheless a decree *in rem*. *Wood vs. Fulton & Starck*, 2 H. & G., 71. Unless a day is allowed for payment, great hardship might follow, especially where the claim set up may have been resisted in good faith. The amount charged may have been excessive, or the defendant have honestly believed the lien did not attach. If mistaken, it cannot be that the law contemplated a decree should be absolute for the sale without giving a day for the payment of the sum found due. A subsequent mortgagee may find it to his interest to pay off the claim and thus avoid the costs and expenses incident to the sale. Many instances might be cited in which it would be eminently equitable to give a day for payment. This, we think, should be done. A decree for a sale, unless the amount due is paid on or before a certain day to be fixed in the sound discretion of the Court, will fully satisfy the requirements of the Act under which these proceedings are had, and at the same time be full equity do all the parties concerned.

The decree in this case will not be affirmed or reversed, but the case sent back under the provisions of Art. 5, sec. 28, of the Code, that the proceedings may be so amended as to conform to the views which we have expressed in this opinion.

*Cause remanded without affirming  
or reversing decree  
of the Circuit Court.*

(Decided 13th June, 1877.)

## GEORGE FLICKINGER vs. HARRISON WAGNER.

*Action for malicious prosecution—Relevant and irrelevant testimony—Probable Cause.*

Proceedings were instituted before a justice of the peace by the assignee in bankruptcy of F. to recover of W. a claim alleged to be due the bankrupt's estate. At the trial F. was a witness, and testified that W. had the use of his horse and wagon for the purpose of hauling bricks, the charge for which use constituted a part of the claim sued for. F. was subsequently arrested at the instance of W., charged with having committed perjury in swearing that W. had the use of the cart and wagon. In an action afterwards brought against W. by F. for a malicious prosecution in so having him arrested, F. offered to prove by his assignee in bankruptcy the amount claimed by the latter to be due from W. in the proceedings before the justice of the peace, and the several credits to which he admitted W. was entitled. On objection, it was **Held**:

That the said testimony was irrelevant and inadmissible.

The defendant proved by his brother that there had been a settlement in June, 1872, between the witness and the plaintiff of all the accounts between the plaintiff and defendant. That in said settlement, the plaintiff's account against the defendant had been credited with the amount due by the plaintiff on a note of his held by the defendant, but which note had not been surrendered to the plaintiff, but remained in the hands of the defendant. That the account settled on that occasion was an account which the plaintiff had against the defendant for bricks, and that witness had informed the defendant the day after the settlement, that he had settled all claims which the plaintiff had against him. The plaintiff upon cross-examination of said witness, asked him if there was anything due upon said note, which question being objected to, his counsel stated they expected to prove facts and circumstances from which the jury might find that no such settlement as that spoken of by the witness had been made; that subsequent to the supposed settlement the defendant had attended a meeting of the plaintiff's creditors held to elect an assignee in bankruptcy, and had there produced said note before the register in bankruptcy, and proved it against the estate of the plaintiff, and offered to vote upon it for witness as assignee of the said bankrupt's estate. **Held**:

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- 1st. That under such circumstances and for such purposes the question was a proper one.
- 2nd. That it was competent for the plaintiff to prove, that the defendant was present at the meeting of creditors, and voted for an assignee of the bankrupt's estate.
- 3rd. That it was not competent for him to ask the witness, who was not present at the meeting, whether the defendant had voted for him as assignee.
- 4th. That it was not competent for him to ask said witness, whether the plaintiff was indebted to the defendant at the time of the trial before the justice of the peace, such question being irrelevant.
- 5th. That it was competent for him to ask said witness if the said note had been cancelled by the credit on the brick account spoken of by him.
- 6th. That it was not competent for the plaintiff to ask said witness a question the answer to which would have been nothing more than the opinion of the witness.

The defendant was having a house built, and in the suit against him before the justice of the peace, he was charged with having the use of the plaintiff's cart and wagon in hauling bricks for this house. HELD:

- 1st. That for the purpose of showing the circumstances which induced the defendant to believe that the plaintiff had testified falsely before the justice of the peace, it was competent for him to prove by a witness, that under the contract of said witness with the defendant, he, (witness,) was obliged to haul the bricks, and that he borrowed and used the plaintiff's wagon for that purpose.
- 2nd. That the motive which operated upon and induced the defendant to have the plaintiff arrested being directly involved in the issues before the jury, the defendant, being a competent witness under the Evidence Act, had the right to explain to the jury the motives under which he acted.
- 3rd. That it was not competent for the plaintiff to ask said defendant upon his cross-examination, what was the matter in controversy between him, (defendant,) and the assignee of the plaintiff in the trial before the justice of the peace; or whether there was any controversy in the trial before the justice, as to whether witness went for the cart *by himself*, or in company with somebody else, said questions being irrelevant.
- 4th. That the fact that the defendant was informed, and believed that the settlement made by his brother with the plaintiff, included all matters of account between them, did not furnish a reasonable cause for his believing that the plaintiff committed perjury, when he subsequently testified before

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the justice of the peace, that the defendant was indebted to him for the use of the cart and wagon. And more especially in view of the insignificant amount involved in the plaintiff's testimony, (three dollars,) which if recovered would have gone not to himself but into his bankrupt estate.

- 5th. That in order to constitute a reasonable and probable cause in cases of this kind, the facts and circumstances must be such as not only to create a bare suspicion, but must be sufficiently strong to satisfy a cautious man that the party is guilty of the charge.
- 6th. That proof that the defendant never had the use of the cart in question, and that it never was in fact used in and about his premises, and that he knew this, would be evidence to justify the defendant in believing that the plaintiff was guilty of the charge for which he was prosecuted, although the defendant was mistaken in so believing, and the plaintiff was not guilty of any such charge.
- 7th. That it was necessary for the plaintiff to prove, that the defendant was actuated by *malice*, and also without probable cause.
- 8th. That when the circumstances are such as to constitute a *reasonable* cause, the *motive* which actuates a party in making an arrest is altogether immaterial.
- 9th. That the fact that the defendant had dismissed the charge of perjury against the plaintiff, was not in itself sufficient evidence to prove that he had not probable cause for instituting the prosecution before the magistrate.

APPEAL from the Circuit Court for Frederick County.

This is an action for malicious prosecution brought by the appellant against the appellee, the nature of which is stated in the opinion of the Court.

*First Exception.*—Stated in the opinion of the Court.

*Second Exception.*—The defendant proved by William H. Wagner, his brother, that the witness and the plaintiff made a settlement in June, 1872; that plaintiff informed witness that this was all the accounts he had against defendant; that after such settlement the witness communicated to the defendant that he, the witness, had settled all claims whatever which plaintiff had against the defendant; that this communication was made the day after the settlement was made, or on the same day thereof; that plaintiff's

account exhibited on that occasion and settled, was for 15,000 bricks purchased by the defendant from the plaintiff at \$8.25 per thousand, making \$123 75; that a note of the plaintiff in favor of Enoch J. Waltz entered into said settlement; that there was due on this note, which was held by defendant against plaintiff with interest, about \$86 00; that this \$86.00 was credited on the back of plaintiff's account, and the balance of about \$37 due to plaintiff on the brick account was credited on a note which witness held against the plaintiff, called the "Trimmer Note," that these two credits paid plaintiff's account as presented in full; that said Waltz note was not surrendered to said plaintiff, but remained in the hands of the defendant.

Upon cross-examination, the plaintiff's counsel asked the witness if there was anything due upon said note; which question being objected to by defendant's counsel, the counsel for plaintiff stated to the Court that they expected to prove facts and circumstances from which the jury might believe that there was no such settlement as that testified to by the witness; that on the 16th day of August immediately following this supposed settlement, there was a meeting of the creditors of George Flickinger before the Register in Bankruptcy in Woodsboro', at which an assignee of the estate of George Flickinger, the plaintiff, was to be voted for; that the witness was a candidate for the position of such assignee; that the defendant, Harrison Wagner, the brother of the witness, attended that meeting and produced this Waltz note before the register, and proved it against the estate of said Flickinger, bankrupt, the plaintiff, and offered to vote on it for the witness for assignee of said bankrupt's estate but the Court (BOYD and LYNCH, J.) sustained the objection of defendant's counsel and refused to permit said question to be asked the witness. The plaintiff excepted.

*Third Exception.*—The said witness further, upon cross-examination, testified, that he had not solicited any one to



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vote for him as assignee of the estate of George Flickinger, bankrupt, and that he was not present at the meeting, but had heard that some few persons had voted for him. The plaintiff's counsel then asked the witness: "Did Harrison Wagner, the defendant, vote for you as assignee?" but the defendant's counsel objected to said question being answered, and the Court sustained the objection, and refused to permit said question to be answered. The plaintiff excepted.

*Fourth Exception.*—The plaintiff's counsel, further, on cross-examination of said witness, asked him if the plaintiff, Flickinger, was indebted to the defendant, Wagner, at the time of the trial before Justice Koontz; which question was objected to by defendant's counsel, and the Court refused to permit the witness to answer the same. The plaintiff excepted.

*Fifth Exception.*—The plaintiff, further, on cross-examination, asked said witness if the Waltz note was cancelled by the credit of \$86 on the brick account, but upon objection by the defendant's counsel, the Court refused to permit said question to be answered. The plaintiff excepted.

*Sixth Exception.*—The plaintiff, further, on cross-examination, asked said witness whether or not the Waltz note, after the settlement spoken of by him, belonged to George Flickinger, but upon objection by the defendant's counsel, the Court refused to permit said question to be answered. The plaintiff excepted.

*Seventh Exception.*—The defendant, to further maintain the issues joined on his part, proved by Enoch J. Waltz, that he, the said witness, repeated to defendant, a conversation which he had with the plaintiff in 1873, in which plaintiff said to witness, that all accounts were settled between the plaintiff and the defendant; and further proved by Samuel Murphy, that he had a wagon of Flickinger in use for about half a day or a little longer on his own account; hired it himself and for himself; that he

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used it to haul brick for Harrison Wagner; that he got the wagon from Flickinger, and told Flickinger that he wanted it to haul brick for Harrison Wagner; the defendant's counsel then asked witness to state under what terms or circumstances he was hauling bricks for Wagner; but plaintiff's counsel objected to said question being answered, unless it was proposed by defendant, to follow it up with proof that Flickinger was acquainted with the terms or circumstances under which witness was hauling bricks for Wagner, and that the fact of Flickinger's knowledge thereof was communicated to said Wagner; but the Court overruled said objection, and permitted said question to be asked and answered; to which question the witness replied, that he was hauling bricks under a contract with Wagner, and that witness was to furnish the means for such hauling. The plaintiff excepted.

*Eighth Exception.*—The defendant then proved by Columbus Welker, that he was present at the trial before Justice Koontz, and that the plaintiff there swore that Harrison Wagner came after the cart, and that Flickinger helped him to hitch it up, and that Harrison Wagner took it away in person.

The defendant's counsel then asked the witness, "what did Flickinger say, if anything, with reference to anybody's being there with Wagner?" to which the plaintiff, before said question was answered, objected as leading, but the Court overruled his objection, and permitted said question to be answered by witness, when witness replied, "I have no knowledge of him making mention of any one else; my recollection is rather clear on the subject of no one else being with Wagner." The plaintiff excepted.

*Ninth Exception.*—The defendant then produced other evidence tending to show that the defendant did not have the plaintiff's cart during the time of the digging and hauling out of defendant's cellar, and then proved by Harrison Wagner, the defendant, that he never at any time

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had the use of plaintiff's cart or wagon. The defendant's counsel then asked the witness to state what contract he had with Samuel Murphy about the hauling of brick for him, to which the plaintiff objected, unless defendant proposed to follow it up by proof that plaintiff knew of said contract, and that his knowledge thereof was known to said defendant, but the Court overruled said objection and permitted witness to answer said question; when the witness said in answer thereto, that said Murphy contracted with witness to haul the brick, and that Murphy was to furnish at his own expense, the means of such hauling. The plaintiff excepted.

*Tenth Exception.*—The defendant's counsel then asked said witness "what was your motive in making the charge of perjury against the plaintiff?" to which the plaintiff objected, but the Court overruled the objection, and permitted the question to be asked and answered; when the witness in answer thereto, said that his motive was justice to himself and to society. The plaintiff excepted.

*Eleventh Exception.*—The said witness further testified in behalf of defendant, that the plaintiff in the trial before Justice Koontz, testified that the witness (H. Wagner,) came alone for the cart and drove it away alone. The plaintiff's counsel then, upon cross-examination, asked the witness "what was the matter in controversy between you and the assignee of Flickinger in the trial before Justice Koontz?" but the defendant's counsel objected to said question being answered, and the Court sustained said objection, and refused to permit the witness to answer said question. The plaintiff excepted.

*Twelfth Exception.*—The plaintiff's counsel further, upon cross-examination of said witness, asked, "was there any controversy in the trial before Justice Koontz as to whether you went for the cart *by yourself*, or went for it in company with somebody else?"

To which the defendant's counsel objected, and the Court sustained said objection, and refused to permit the witness to answer said question. The plaintiff excepted.

*Thirteenth Exception.*—After further evidence offered on the part of the plaintiff and defendant, the defendant offered the eighteen following prayers :

1. The defendant, by his counsel, prays the Court to instruct the jury upon the evidence, that if the jury shall believe from the evidence that Dr. W. H. Wagner and plaintiff made a settlement in June, 1872 ; that the use of the cart for two weeks and the wagon for one day, spoken of by plaintiff in his evidence, had transpired before such settlement, if the jury shall so find that after such settlement Dr. W. H. Wagner communicated to defendant that he, Dr. W. H. Wagner, had settled all claims whatever which plaintiff had against him, defendant ; that this communication was made in 1872 ; if the jury shall so find, that in 1873 a certain Enoch Waltz repeated to defendant that he, Waltz, had had a conversation with plaintiff, in which plaintiff admitted that all accounts between plaintiff and defendant had been settled ; and shall further find that defendant believed such communications to be true ; that then the defendant had reasonable and probable cause from which he could reasonably believe that plaintiff had committed perjury, when, in an action before Godfrey Koontz, a justice of the peace for Frederick County, of State of Maryland, if the jury shall find such action and such justice of the peace, in which George W. Smith, assignee in bankruptcy of plaintiff, had sued defendant for a bill, if the jury shall so find, in the items of which were included the charge for the user of a cart two weeks and a wagon one day, if the jury shall so find plaintiff swore that defendant had the use of his, plaintiff's cart for two weeks and his wagon one day, and the verdict of the jury must be for defendant, even though the jury should find, as a matter of fact, that defendant did

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have the use of plaintiff's cart two weeks and his wagon one day, and that the same was not in fact settled for in any settlement made with Dr. W. H. Wagner ; and shall further find, that Dr. W. H. Wagner knew it was not so settled for ; and shall further find, that no such conversation was had between plaintiff and Enoch Waltz.

2. The defendant, by his counsel, prays the Court to instruct the jury upon the pleadings and all the evidence, that if the jury shall believe from the evidence that in June, 1872, a settlement was had between Dr. W. H. Wagner and plaintiff, in which Dr. W. H. Wagner believed that all accounts up to that time, which plaintiff had against defendant, had been settled for and liquidated ; and shall further find, that this fact of a settlement was communicated in the form and manner so believed by Dr. W. H. Wagner to H. Wagner ; and shall further find, that Dr. H. Wagner really believed that a settlement of the character mentioned had been made by Dr. W. H. Wagner, that then defendant had reasonable and probable cause to believe that plaintiff had committed perjury when he swore before Godfrey Koontz, in July, 1874, if the jury shall find he did so swear, in an action instituted before said justice by the assignee in bankruptcy of said plaintiff, to recover from the said user of said cart and wagon, if the jury shall so find that defendant had his cart for two weeks and his wagon for one day, and that the verdict of the jury must be for defendant, even though jury should further find, that as a matter of fact, the said items of user of a cart for two weeks and wagon for one day, were not included in said settlement made with Dr. W. H. Wagner, and though the jury should believe that as a matter of fact plaintiff swore to the truth when he made the statement hereinbefore mentioned, before Godfrey Koontz, on the 15th day of July, 1874, if the jury shall so find.

3. That if the jury shall find upon the pleadings and all the evidence, that Dr. W. H. Wagner communicated

to defendant that all claims which plaintiff had against defendant had been settled for in June, 1872; that the charge for the user of the cart for two weeks and wagon one day, had accrued against Dr. H. W., before said settlement; that said charge was not included in the account plaintiff produced at said settlement in 1873, in fact; that Enoch Waltz had communicated to defendant that plaintiff had informed him that all accounts between defendant and plaintiff had been settled; that Murphy had informed defendant in 1874, or before, that he, Murphy, on the occasion when plaintiff's wagon had been used for hauling brick, had been used by Murphy, and gotten by him, and not by defendant; that defendant believed these several statements to be true, that then defendant had reasonable and probable cause to believe that plaintiff had committed perjury, when, in July, 1874, in a trial depending before Godfrey Koontz, a justice of the peace for State of Maryland, in and for Frederick County, instituted against him by G. W. Smith, assignee in bankruptcy, for a bill of the items, of which was the user of the cart for two weeks and a wagon of plaintiff's for one day; plaintiff swore that defendant had had the user of his cart for two days and his wagon for one day, even though the jury should believe from the evidence that defendant had the use of plaintiff's cart for two weeks and his wagon for one day, and even if the jury should believe that the statements made to Wagner by Dr. W. H. Wagner, Murphy and Enoch Waltz, were untrue in fact.

4. That if the jury shall believe from the evidence that Murphy hired or borrowed the wagon from plaintiff, and that defendant did not borrow or hire the same from plaintiff, and that defendant knew this fact when he made the charge before White; that then defendant had reasonable and probable cause for believing that plaintiff had committed perjury, when, in the trial before Koontz, plaintiff swore that defendant had the use of his cart two weeks

and his wagon one day ; if jury shall find plaintiff did so swear, and the verdict of the jury must be for the defendant.

5. That if the jury shall find from all the evidence under the pleadings in this case, that plaintiff and Dr. W. H. Wagner had made a settlement in June, 1872, of all accounts which plaintiff had at that time against Dr. H. Wagner ; that the items for the user of a cart and wagon mentioned in plaintiff's evidence, had been incurred as a debt by Dr. H. Wagner before said settlement, that the fact of such settlement having been made, was communicated to defendant before August 3rd, 1874, and was believed by defendant ; that then defendant had reasonable and probable cause for believing that plaintiff had committed perjury in the trial before Godfrey Koontz, in swearing as in declaration alleged, and the verdict of the jury must be for defendant, even though the jury should find as a matter of fact that the user of said cart and wagon had not been included in said settlement.

6. The defendant, by his counsel, prays the Court to instruct the jury upon the pleadings and all the evidence, that if the jury shall believe from the evidence that defendant, on the 3rd day of August, 1872, before Frederick White, Esq., a justice of the peace of State of Maryland, in and for Frederick County, if the jury shall so find, preferred a charge of perjury against plaintiff, alleging that plaintiff had committed perjury on the 15th day of July, 1874, in a cause depending before Godfrey Koontz, if the jury shall so find, then and there being a justice of the peace of the State of Maryland, in and for Frederick County, if the jury shall so find, in swearing or affirming that defendant had the use of plaintiff's cart two weeks and wagon one day, if the jury shall so find, and that said Frederick White discharged the plaintiff from said charge, and that such acquittal or discharge was the result of deliberation and hesitation, and that the evidence before him was so

conflicting and doubtful on both sides, that said justice was not able to decide, and that he gave the prisoner the benefit of the doubt, and decided to discharge him, then the verdict of the jury must be for defendant; that the fact of said doubting and testimony upon the question of holding or discharging plaintiff constitute such probable cause on part of defendant, making charge as to excuse him therefor.

7. That to enable the jury to infer malice from the want of probable cause, the jury must be satisfied from the evidence that defendant had not probable cause to believe that plaintiff had committed the act complained before the justice, and that the burden of proof is on plaintiff to show the want of probable cause; that probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty of the charge preferred against him by said defendant to said justice.

8. That to enable the jury to infer malice from want of probable cause, the jury must be satisfied from the evidence that at the time of making the charge before the magistrate, the defendant did not believe the same to be true, but made the said charge, knowing and believing the same to be false.

9. That before the jury can find that defendant made the charge in evidence, spoken of before the magistrate, maliciously, the jury must be satisfied that at time of making said charge, defendant knew or believed the same to be wilfully false, and the verdict must be for defendant, unless the jury shall find said charge to have been malicious.

10. The defendant, by his counsel, prays the Court to instruct the jury from the pleadings and evidence in this cause, that if they shall believe that the defendant on the 3rd day of August, 1874, went and appeared before Frederick White, a justice of the peace of the State of Mary-



land, in and for Frederick County, and charged plaintiff with having committed perjury in swearing or affirming in a trial of a cause before Godfrey Koontz, Esq., a justice of the peace of said county and State, that the defendant had the use of his cart for two weeks and his wagon for one day, then the jury cannot infer malice on the part of the defendant in making said charge before said magistrate unless they shall believe that said defendant made said charge, knowing the same to be wilfully false, even though the jury may believe the charge made by the defendant against the plaintiff was in fact untrue.

11. The defendant, by his counsel, prays the Court to instruct the jury upon the pleadings and all the evidence, that if the jury shall believe from the evidence that the defendant, in making the charge against plaintiff, as mentioned in evidence, if they, the jury, shall believe the same, made said charge maliciously and with the design and intent to persecute him and impoverish plaintiff, that notwithstanding the verdict of the jury must be for the defendant, if the jury shall believe from the evidence that defendant at the time he preferred the charge against plaintiff in evidence mentioned, believed and knew of the existence of facts and circumstances, if true, would excite in a reasonable mind the belief that the charge he made before the magistrate was true, even though they shall believe that in fact said charge was false and unfounded.

12. The defendant, by his counsel, prays the Court to instruct the jury upon the pleadings and all the evidence, that if the jury shall believe from the evidence, that the defendant, on the 13th day of August, 1874, went and appeared before Frederick White, a justice of the peace of the State of Maryland, in and for Frederick County, if the jury shall find said justice of peace, and charged plaintiff with having committed perjury in swearing before Godfrey Koontz, a justice of the peace for Frederick County, State of Maryland, if the jury shall find said justice, that

defendant had had the use of his, plaintiff's, cart for two weeks and his wagon one day ; and shall further find that defendant, on August 5, appeared before said justice, and from his testimony and educed evidence of other witnesses to establish said charge, that though the jury shall believe from the evidence that said charge so laid by defendant against plaintiff was utterly and entirely false in fact, that their verdict must be for defendant, unless the jury shall further find that at the time of making said charge and giving said testimony, if the jury shall so find, the defendant knew and believed said charge to be false and unfounded.

13. The defendant, by his counsel, prays the Court to instruct the jury, upon the pleadings and all the evidence, that if the jury shall believe from the evidence the facts, as stated in the preceding prayers, that then the verdict must be for the defendant, unless the jury shall further find that the defendant wilfully and intentionally made the charge before Justice White, knowing and believing the same to be false and unfounded.

14. The defendant, by his counsel, prays the Court to instruct the jury under the pleadings and evidence in this cause, that if they shall find that in May, 1872, the defendant commenced the erection of a building in the town of Woodsborough, that on the 15th day of May of said year, the excavation and digging for the foundation commenced, and was continued for three days successively, 15th, 16th and 17th days of May, and that the same was then finished except some trimming and digging of the trench for foundation walls, which was done on the 18th and 21st of May following, that the dirt and earth that came from said cellar and foundation was hauled or carted off by three carts, not more than two carts being used for said purpose at any one time, if the jury shall so find, and that on the 15th day of May in said year, the carts in use were those belonging respectively to Saml. Bassard and — Albaugh, and

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were drawn by horses belonging to Cornelius Haugh and Wm. Barrick, and that on the 16th day of May in said year, the carts in use were the same as used on the said 15th day of May, till late in the afternoon of said 16th day of May, when the cart belonging to said Albaugh gave out and was no longer fit for use, if the jury shall so find, and that on the morning of the 17th day of May, another cart belonging to David Dorcus was brought to said foundation and substituted for the cart owned by said Albaugh, which had broken down, and was drawn by a grey horse belonging to the witness Murphy, if the jury shall so find, and that no other carts were used in and about said foundation in the digging and excavation thereof; and shall further find, that during the time of the erection of said building no carts were used, and shall further find that the wagon spoken of by the witnesses was obtained by the witness Murphy from the plaintiff on his own account for his own use, and not for and on account of the use of the defendant, and that the defendant knew these facts and believed the same to be true, and that the plaintiff in the year 1874, made out an account against the defendant charging him with hire for the use of his cart for two weeks and his wagon one day, at the time of the digging of said foundation, and at the time of the hauling the brick for said building, if the jury shall so find from the evidence; and shall further find that George W. Smith, claiming to be assignee of said plaintiff, instituted suit before Godfrey Koontz, Esq., a justice of the peace of the State of Maryland, in and for Frederick County, on said account against the defendant, to recover the same from said defendant, and that at the trial before said justice, the said plaintiff swore or affirmed that said defendant had the use of his cart for two weeks, and his wagon for one day, charged in plaintiff's declaration, and that afterwards the said defendant appeared before Fredk. White, Esq., a justice of the peace, of the State and county afore-

said, and on oath charged the plaintiff with perjury in making said oath or affirmation aforesaid, if the jury shall so find, and that at the time of making said charge and complaint the defendant believed and knew of the existence of the facts and circumstances before recited and specified—then that such fact and circumstances were such as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the defendant, that the plaintiff was guilty of the charge for which he was prosecuted, and their verdict must be for the defendant, although the jury may believe that said defendant was mistaken in so believing, and that the plaintiff was not guilty of any such charge.

15. The defendant, by his counsel, prays the Court to instruct the jury under the pleadings and evidence in this cause, that if they shall believe that Harrison Wagner, the defendant, at the time he made oath before Frederick White, Esq., testified to by the witnesses charging the plaintiff with perjury, believed and knew that the cellar or foundation testified to by the witnesses was dug out and excavated in three days, that the dirt and earth that came from said foundation was hauled or carted off by three carts, only two being in use at any one time; that the carts in use at said foundation, on the 15th and 16th of May, 1872, belonged respectively to Saml. Bassard and — Albaugh, that said carts were in use up to the evening of the 16th of May, when the cart owned by said Albaugh gave out, that on the morning of the 17th of May another cart belonging to David Dorcus was brought to said foundation and substituted for the cart owned by said Albaugh which had broken down, and that no other carts were used in and about said foundation in the digging and excavation thereof, or in the erection of the building erected thereon, except those above specified and testified to by the witnesses; and shall further find that the wagon spoken of by the witnesses was obtained by the witness

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Murphy on his own account and for his use, and not for and on account of the use of Dr. Wagner, the defendant, then said facts, if true, would excite in a reasonable mind the belief that the charge defendant made was true, and the verdict of the jury must be for the defendant, even though the jury may believe that the said defendant was mistaken is so believing, and that the plaintiff was not guilty of any such charge.

16. That under the pleadings and evidence in this cause the verdict of the jury must be for defendant, because there is no such arrest and imprisonment by plaintiff as to justify a verdict upon the issues joined.

17. That the issue in this case under the pleadings, is not whether what Flickinger, the plaintiff, swore to before Godfrey Koontz was true or false, and whether or not he in fact was guilty of perjury, but that the issue is whether the defendant when he lodged the complaint of perjury, had reasonable or probable cause to believe that Flickinger had sworn falsely in testifying defendant had had the use of his cart two weeks and his wagon one day, if the jury shall find that plaintiff did swear before Koontz that defendant had the use of his cart two weeks and his wagon one day, and whether defendant made said charge maliciously or not; and even if the jury shall find from the proof those facts which show there was no reasonable or probable cause for defendant's believing plaintiff had sworn falsely, their verdict must nevertheless be for the defendant, unless they shall further find that the defendant was prompted by malice in making the charge, and the burden of proof is on the plaintiff to show there was malice, and not on the defendant to show there was not.

18. The defendant, by his counsel, prays the Court to instruct the jury, upon the pleadings and all the evidence, that if the jury shall believe from the evidence that defendant, on the 3rd day of August, 1872, before Frederick White, Esq., a justice of the peace of the State of Mary-

land in and for Frederick County, if the jury shall so find, preferred a charge of perjury committed by plaintiff on the 15th day of July, 1874, in a cause depending before Godfrey Koontz, if the jury shall so find, then and there being a justice of the peace of the State of Maryland, in and for Frederick County, if the jury shall so find, in swearing or affirming that defendant had the use of plaintiff's cart two weeks and wagon one day, if the jury shall so find, and that said Frederick White discharged the plaintiff from said charge, and that such acquittal or discharge was the result of deliberation and hesitation, and that the evidence before him was so conflicting and doubtful on both sides that said justice was not able to decide, that he gave the prisoner the benefit of the doubt, and decided to discharge him, then the magistrate's judgment is not sufficient evidence to prove that the defendant has not probable cause for instituting the prosecution before the magistrate.

The Court granted the defendant's first, third, fourth, fifth, seventh, eleventh, fourteenth and eighteenth prayers, and rejected his second, sixth, eighth, ninth, tenth, twelfth, thirteenth, fifteenth, sixteenth and seventeenth prayers. The plaintiff excepted.

The jury rendered a verdict for the defendant, and judgment was entered accordingly. The plaintiff appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT and ROBINSON, J.

*Francis Brengle* and *Fred. J. Nelson*, for the appellant.

*Wm. P. Maulsby, Jr.* and *Charles W. Ross*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

Proceedings were instituted before a justice of the peace by Smith, assignee in bankruptcy, of the appellant, to

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recover of the appellee, a claim alleged to be due the bankrupt's estate. At the trial the appellant was a witness, and testified that the appellee had the use of witness' cart for about two weeks, and his wagon one day for the purpose of hauling bricks, charges for which, amounting to three dollars, constituted part of the account claimed to be due by the appellee.

The appellant was subsequently arrested at the instance of the appellee, charged with having committed perjury in testifying before the justice of the peace, that the appellee had the use of the appellant's cart and wagon, and this suit is brought to recover damages of the appellee for malicious prosecution.

Twelve exceptions are taken to the rulings of the Court below, in regard to the admissibility of evidence, and the thirteenth to the several prayers offered by the appellee, and granted by the Court.

*1st Exception.*—The appellant, plaintiff below, offered to prove by Smith, the assignee in bankruptcy, the amount claimed by the latter, to be due from the appellee in the proceedings before the justice of the peace, and the several credits to which he admitted the appellee was entitled. This evidence seems to us to be wholly irrelevant, and was therefore properly excluded. The question before the jury was whether the defendant was actuated by malice, and want of reasonable or probable cause, in making the charge of perjury against the plaintiff, and the amount claimed by the assignee in bankruptcy in the suit before the justice, tended in no manner to prove the issues presented by the pleadings.

*2nd Exception.*—We see no objection to the evidence offered by the plaintiff in this exception. The defendant had proved by Doct. W. H. Wagner, his brother, that subsequent to the date of the charges for the use of plaintiff's cart and wagon, there was a settlement between the witness and the plaintiff, of the accounts which the latter

had against the defendant,—that the only item in the account presented by the plaintiff, was a charge for fifteen thousand bricks at  $\$8\frac{2}{3}$  per thousand. That this account was settled in part by a note of the plaintiff held by the defendant as assignee of Waltz, upon which the sum of  $\$86$  was due, and the balance paid by claims which the witness held against the defendant—that the plaintiff said he held no other claims against the defendant, and that on the same day, or the day after the settlement, the witness informed the defendant that he had settled all claims which the plaintiff had against him. The plaintiff, on cross-examination, then asked the witness whether anything was due on the Waltz note, and stated to the Court, that he expected to prove facts and circumstances from which the jury might infer that there was no such settlement as that testified to by the witness; and that on the 16th of August immediately following this supposed settlement, there was a meeting of the creditors of the plaintiff before the register in bankruptcy, and at which an assignee in bankruptcy of the plaintiff was to be elected. That the defendant was present at that meeting, and produced the Waltz note before the register, and proved it as against the estate of the plaintiff, and offered to vote on it for an assignee of the bankrupt's estate. Under such circumstances and for such purposes, we think the question was a proper one, and the Court erred in refusing to permit the witness to answer the same.

*3rd Exception.*—It was also competent for the plaintiff to prove that the defendant was present at the meeting of creditors, and voted for an assignee of the bankrupt's estate. But it appears that the witness was not present at such meeting, and did not know who voted for the assignee, except what he had heard from others, and the objection to his testimony in this respect, was properly sustained.

*4th Exception.*—The question whether the plaintiff was indebted to the defendant at the time of the trial before



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the justice of the peace, was of course irrelevant, and therefore properly excluded.

*5th Exception.*—The Court erred in excluding the testimony offered in this exception. For the reasons assigned in considering the second exception, the plaintiff had the right to ask the witness, Wagner, whether the Waltz note was in fact cancelled by the credit of \$86 applied to the plaintiff's account for bricks.

*6th Exception.*—We find no error in this exception. The answer to the inquiry proposed in this exception would have been nothing more or less than the opinion of the witness, and therefore inadmissible.

We see no objection to the evidence offered under the seventh, eighth and ninth exceptions. The defendant was having a house built, and in the suit against him before the justice of the peace, he was charged with having the use of the plaintiff's cart two weeks, and wagon one day, in hauling bricks, &c., for this house. Now, for the purpose of showing the circumstances which induced the defendant to believe that the plaintiff had testified falsely before the justice of the peace, it was clearly competent for him to prove by Murphy, that under witness' contract with the defendant, he was obliged to haul the bricks, and that he borrowed and used the plaintiff's wagon for that purpose.

The objection to the evidence offered in the tenth exception, was properly overruled. The motive which operated upon and induced the defendant to have the plaintiff arrested on the charge of perjury, was directly involved in the issues before the jury, and being a competent witness under the Evidence Act, the defendant had the right to explain to the jury the motives under which he acted.

The evidence offered under the eleventh and twelfth exceptions, was irrelevant, and therefore properly excluded.

Having thus briefly disposed of the exceptions to the rulings of the Court upon questions of evidence, we now

come to the law of the case as presented by the several prayers offered by the defendant and granted by the Court.

In the first prayer, the Court instructed the jury, that if there was a settlement between the witness, Doct. W. H. Wagner, and the plaintiff, subsequent to the date of the charges for the cart and wagon, as testified to by the plaintiff before the justice of the peace, and that the witness informed the defendant that he had settled all claims whatever, which the plaintiff had against him; and that Waltz also informed the defendant that the plaintiff had admitted to him that all accounts between the plaintiff and defendant had been settled, and the defendant believed these statements, that then he had reasonable and probable cause for believing the plaintiff had committed perjury, when he testified before the justice of the peace, that the defendant had the use of his, plaintiff's cart and wagon, even though the jury should find, that the defendant had the use of the plaintiff's cart and wagon, and the same was not in fact included in the settlement with the witness, Wagner.

In other words, if there had been a settlement between the plaintiff and the witness Wagner, subsequent to the date of the charges for the cart and wagon, and the plaintiff admitted that such settlement embraced all matters of account between him and the defendant, and the latter was so informed and believed, that then he had reasonable ground for believing the plaintiff committed perjury when he testified before the justice of the peace that the defendant was indebted to him for the use of a cart for two weeks and a wagon for one day; although the jury should find as matter of fact that the charges for the use of the cart and wagon were not included in the settlement. We cannot recognize a standard so unjust and uncharitable by which the actions and motives of men are to be judged. Every day's experience teaches us that mistakes do occur in settlements, even between the most prudent and care-

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ful, and items of account are oftentimes inadvertently omitted in settlements which are intended to embrace all the dealings between the parties. And to say in this case, because the defendant had been informed and believed that the settlement made by his brother, Doctor Wagner, with the plaintiff included all matters of account between them, he had, therefore, a reasonable cause for believing the plaintiff committed perjury when he subsequently testified before a justice of the peace that the defendant was indebted to him for the use of a cart and wagon, is a proposition to which we cannot yield our assent. And, especially, when we take into consideration that the charges for the cart and wagon amounted to the paltry sum of three dollars, and which, if recovered, belonged to the bankrupt's estate. Instead of satisfying the defendant that the plaintiff had committed perjury, we think the circumstances were such as to have suggested to a fair and impartial mind that there must have been a mistake in the settlement with Doctor Wagner and that these items had been omitted. It is the well settled law in this State that, in order to constitute a reasonable and probable cause in cases of this kind, the facts and circumstances must be such as not only to create a bare suspicion, but must be sufficiently strong to satisfy a cautious man that the party is guilty of the charge. *Boyd vs. Cross*, 35 Md., 194; *Stansbury vs. Fogle*, 37 Md., 369.

For the same reasons, we think the Court erred in granting the third, fourth and fifth prayers. The proof shows that the wagon was used in hauling bricks for the defendant's house, and although it was hired or borrowed by *Murphy, the contractor*, and the defendant was so informed and believed, yet this fact, taken in connection with the facts in the first prayer, would not constitute a probable cause.

We find no error in the fourteenth prayer. If the facts set forth in that prayer be true, and the defendant knew them to be true, then he had probable cause for believing the

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plaintiff committed perjury, because they prove the defendant never had use of the cart, and that it was not in fact used in and about the premises.

The eleventh prayer was also properly granted. In order to recover in this case, it was necessary for the plaintiff to prove that the defendant was actuated by *malice* and also without probable cause. If the facts and circumstances were such as to satisfy a cautious person that the plaintiff had committed perjury, the defendant was not liable for damages, although in having the plaintiff arrested he was actuated by malice and a desire to impoverish him. In other words, when the circumstances are such as to constitute a *reasonable* cause the *motive* which actuates a party in having another arrested is altogether immaterial.

There can be no doubt as to the proposition announced in the eighteenth prayer. The fact that the defendant had dismissed the charge of perjury against the plaintiff was not, of course, in itself sufficient evidence to prove that the defendant had not probable cause for instituting the prosecution before the magistrate.

The Court having erred in excluding the evidence offered in the second and fifth exceptions and in granting the first, third, fourth and fifth prayers of the defendant, the judgment will be reversed and new trial awarded.

*Judgment reversed, and  
new trial awarded.*

(Decided 13th June, 1877.)

LEWIS SCHINDEL *vs.* CHRISTIAN GATES.*Principal and Surety—Statute of Limitations.*

The payment by the principal, year by year, of the interest on a joint and several promissory note, will prevent the Statute of Limitations from attaching to the note in favor of the surety.

The rule on this subject, laid down in *Ellicott vs. Nicols*, 7 Gill, 86, has been the accepted law of this State for nearly thirty years, and in the absence of legislation to the contrary, it is not to be questioned.

## APPEAL from the Circuit Court for Washington County.

This suit was instituted by the appellee on the 4th day of February, 1876, against Jonathan Middlekauff and the appellant, to recover the amount of a joint and several promissory note for \$765.00, dated March 31, 1866, payable in one year with interest, from date, signed by Jonathan Middlekauff, and the appellant, Lewis Schindel.

At the trial, Schindel pleaded non-assumpsit, limitations, and that he was the mere surety for Middlekauff, and gave him no authority to do any act so as to revive the note against him, and thereby defeat his plea of limitations.

Issue was joined on the first two pleas, and a demurrer interposed to the third plea, which demurrer was sustained by the Court.

The case as against Schindel was tried before the Court, (MOTTER, J.)

*First Exception.*—The plaintiff, to sustain the issues on his part joined, gave in evidence the note sued on in this case, and the counsel of the defendant admitted that the signatures to said note were genuine. The plaintiff then proved by himself, that he got said note at the office of

Mr. Wiles, his attorney, who had collected some money for him, and as his attorney, and at his request, had re-invested the same for him, the plaintiff, in the said note, and had received said note as attorney for the plaintiff, and that said Wiles gave the note to the plaintiff some time after its execution, and that the plaintiff never personally knew the defendant Lewis Schindel.

And then further to support the issues joined on his part, offered to prove by the plaintiff, that said Jonathan Middlekauff, in each and every year since the making of said note, up to April 1st, 1874, had paid the interest due on said note as said interest became due, and said Jonathan Middlekauff, on April 1st, 1874, promised to pay said note to the plaintiff. The defendant, Lewis Schindel, objected to the said evidence so offered, but the Court overruled the objection and admitted the evidence. The defendant excepted.

*Second Exception.*—The defendant further to prove the issue on his part joined, offered to prove by the plaintiff, that at the time he accepted the note offered in evidence, he, the plaintiff, knew that Jonathan Middlekauff was principal debtor, and that Lewis Schindel was surety on said note: and the plaintiff, by his counsel, objected, and the Court sustained the objection. The defendant excepted.

*Third Exception.*—After the evidence in the foregoing bills of exceptions had been introduced, the plaintiff offered the following prayer.

1. That if the Court finds from the evidence in the cause that the note sued on was executed and delivered by Jonathan Middlekauff and Lewis Schindel to the plaintiff, and that the said Jonathan paid the interest on said note, from the maturity thereof, annually to the plaintiff, and up to April 1, 1874, and that the said Jonathan, on the 1st April, 1874, before the institution of the suit, promised to pay the said note to the plaintiff, then the Statute of Limitations, as pleaded, is no defence in this action.

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And the defendant offered the four following prayers.

1. This defendant, Lewis Schindel, by his counsel, prays the Court to say, that if the Court finds from the evidence that the plaintiff is the payee and holder of the note offered in evidence, and that the plaintiff got the said note at Mr. Wiles', his attorney's, office, and that the plaintiff never personally knew this defendant, and that said note became due on the 31st day of March, 1867, and that this defendant made said note jointly with Jonathan Middlekauff, and that the said Jonathan Middlekauff paid the interest on said note every year up to April 1st, 1874, and said Middlekauff on April 1st, 1874, promised to pay said note to the plaintiff, then on the pleadings in this case, the plaintiff is not entitled to recover, unless the Court further find from the evidence that this defendant, Lewis Schindel, at some time within three years before the bringing of this suit, acknowledged said note, or authorized said Jonathan Middlekauff to make said payments, or any of them, or ratified the making of said payments, or any of them.

2. This defendant, Lewis Schindel, by his counsel, prays the Court to say, that if the Court finds from the evidence that the plaintiff is the payee and holder of the note offered in evidence, and that the plaintiff got said note at the office of Mr. Wiles, his attorney, and that the plaintiff never personally knew this defendant, and that said note became due on the 31st of March, 1867, and that this defendant made said note jointly with Jonathan Middlekauff, and that said Jonathan Middlekauff paid the interest on said note every year up to April 1st, 1874, and said Middlekauff, on April 1st, 1874, promised to pay said note to the plaintiff, then on the pleadings in this case, the plaintiff is not entitled to recover, unless the Court further find from the evidence that this defendant, Lewis Schindel, at some time within six years before the bringing of this suit, acknowledged the said note, or authorized said Jonathan Middlekauff to make said payments, or any of them, or ratified the making of said payments, or any of them.

3. This defendant, Lewis Schindel, by his counsel, prays the Court to say in this case, that said Jonathan Middlekauff had no authority, only and solely from the fact that he was the joint maker with this defendant, Lewis Schindel, of the note sued on in this case, to bind this defendant Lewis Schindel, by any acknowledgment of said note, or by any promise to pay said note, or by any payment on said note, made by him, the said Jonathan Middlekauff, more than three years after the maturity of said note.

4. This defendant, Lewis Schindel, by his counsel, prays the Court, that if the Court find from the evidence, that Jonathan Middlekauff and Lewis Schindel made the note offered in evidence, and that from the time of its maturity to the year 1874, inclusive, the said Middlekauff annually paid the interest on said note, and frequently promised to pay the principal, nevertheless the plaintiff is not entitled to recover under the pleadings in this cause, unless the Court further find that Lewis Schindel personally authorized or ratified said payments or promises, or any of them, or himself promised to pay said note, or himself acknowledged the debt evidenced by said note, within three years before the bringing of said suit. And the Court granted the plaintiff's prayer, and rejected the defendant's prayers. The defendant, Lewis Schindel, excepted.

A judgment was entered for the plaintiff, and the defendant appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Tryon Hughes Edwards* and *Louis E. McComas*, for the appellant.

In regard to the power of one joint maker of a note to deprive the other of the defence of the statute, three distinct and irreconcilable theories are found.



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*The First.* That there is such a power, and that it exists indefinitely. *Channell vs. Ditchburn*, 5 *Mees. and Wells.*, 494; *Goddard vs. Ingram*, 3 *Gale and David*, 46.

(Both of these cases are specially repudiated in *Ellicott vs. Nichols*, 7 *Gill*, 105, 106 )

*Whitcomb vs. Whiting*, as construed by the English cases, was a departure from the letter and spirit of the Statute of Limitations.

In England this interpretation of the statute has been partly corrected by 9 *George IV*, *ch. 14, sec. 1*, (Lord Tenterden's Act,) and entirely by the Mercantile Law Amendment Act of 1858, 19 and 20 *Vict.*, *ch. 97, sec. 14*.

Since which Acts no co-contractor can bind the other by virtue of any promise, acknowledgment or payment of interest or principal. *Smith's Lead. Cas.*, (7th Ed.), *vol. 1, part 2, pages 942, 945, 980 and 981*; *American Notes to Whitcomb vs. Whiting*.

In Massachusetts, where this theory was once accepted, (*Vid. White vs. Hale*, 3 *Pick.*, 292,) it has been repudiated by statute.

(That case, *White vs. Hale*, has itself been overruled by *Sigourney vs. Drury*, 14 *Pick.*, 391;) *Sm. Lead. Cas.*, *Ibid*, 984 and 985.

In Maine, also, where the doctrine was held, it has been changed by the revised statutes. *Sm. Lead. Cas.*, *Ibid*, 981.

So, too, in Vermont. *Rev. Stat.*, *ch. 28, secs. 22-27*.

*The Second.* That there is no such power.

This second theory is held in Supreme Court U. S , *Bell vs. Morrison*, 1 *Peters*, 351; in New Hampshire, *Exeter Bank vs. Sullivan*, 6 *N. H.*, 124; in Ohio, *Palmer vs. Dodge*, 4 *Ohio N. S.*, 21-36; in Pennsylvania, in a series of well considered cases: *Coleman vs. Fobes*, 22 *Pa. St.*, (10 *Harris*), 156; *Levy vs. Cadet*, 17 *Serg. & R.*, 126; *Searigh vs. Craighead*, 1 *Penn. Rep.*, 135; *Howser vs. Irvine*, 3 *Watts & S.*, 345; *Schoneman vs. Fegley*, 7 *Barr.*,

433 ; *Bush vs. Stowell*, 71 Pa. St., 208 ; *Reppert vs. Colvin*, 48 Pa. St., 248.

In New York, where the first theory was adopted in the earlier cases, it has been entirely repudiated, and this second doctrine is now maintained, in cases very ably reasoned. *Vankeuren vs. Parmalee*, 2 N. Y., (Comstock,) 523 ; *Payne vs. Slete*, 39 Barbour, 634 ; *Shoemaker vs. Benedict*, 11 N. Y., 176 ; *Winchell vs. Hicks*, 18 N. Y., 558 ; *Dunham vs. Dodge*, 10 Barbour, 556.

Wherein it is said that a part payment by one co-contractor will not bind the other, whether such acknowledgment be made before or after the bar of the Statute.

And see the cases cited : *Sm. Lead. Cas.*, *Ibid*, 982 and 983.

And the latest case, *Layberry vs. Willoughby*, *Nebraska Sup. Ct.*, January T., 1877. *5 N.W.* 368

*The Third.* (A middle ground.) That there is such a power, but that it ends when the legal term prescribed by the statute has elapsed.

This doctrine rests "on the ground that the common interest, which alone makes the admission of one debtor binding on another, ceases whenever the statute takes effect, and leaves both in the position of mere strangers, who are not answerable for each other's words or acts." *Sm. Lead. Cas.*, *Ibid*, 684, and cases cited.

It appears that in most of the States as well as now in England, the second doctrine prevails either by legislation or adjudication.

Whilst comparatively few States adopt the third doctrine, among which is Maryland. See *Ellicott vs. Nichols*, 7 Gill, 85 ; *Newman vs. McComas*, 43 Md., 70 ; *McCann, et al. vs. Sloan & Caldwell*, 25 Md., 588 ; *Lingan vs. Henderson*, 1 Bland, 236.

In *Ellicott vs. Nichols*, the sentence, which, after the conclusion of the reasoning, gives the rule laid down by the case, is, "the acknowledgment of one partner of a sub-

sisting partnership debt, if made subsequent to the dissolution of the partnership, and after the Statute of Limitations has operated on the demand, is not evidence against his co-partners, so as to deprive them of the benefit of the statutory bar." (Page 108.)

The words "the Statute of Limitations has operated on the demand," are used as equivalent to the words, (used all through the opinion in *Ellicott vs. Nichols*,) "the Statute of Limitations has attached to the note," which last words are more clearly defined in *Newman vs. McComas*, 42 Md., page 79, bottom of page, as equivalent to "three years after the date of the note," which the note, in that last case, being payable on demand, are equivalent to three years after the maturity of the note.

The promise of one co-contractor to avoid the Statute as to the other, must have two qualities:

1st. It must have force to revive the debt, i. e., be within three years after maturity.

2d. It must be within the issue, i. e., be within three years before suit brought.

That these incidents are each essential to a binding promise has recently been decided by this Court in *Newman vs. McComas*. In that case, also, the doctrine of continuing promises was invoked by counsel to bind one late partner by the promise of the other. The Court, in deciding how the plaintiff's prayer should have been drawn, say that the words "*promise made before the Statute of Limitations had attached to the note*," are equivalent to the words, "*such promise had been made within three years after the date of the note*," (i. e., after maturity,) and also that "*such promise had been made within three years before the institution of the suit*." That both conditions are "necessary to remove the bar of the statute;" thus repudiating the doctrine of continuing promises. *Newman vs. McComas*, 43 Md., 79 and 80; also, in *Smith vs. Caldwell*, 15 Rich. (S. C.,) Law, 365.

The distinction taken in some cases, between a new promise being a new contract supported by the old contract, and its being a revival of the old contract, seems to be "a distinction too thin and subtle to be received with satisfaction." *Vid.* opinion of HARRIS, J., in *Carsore vs. Huyck*, 6 Barb., (N. Y.,) 583.

This Court having said that the "new promise alone gives vitality and is substantially the cause of action." *Ellicott vs. Nichols*, 7 Gill, 90.

The reasoning in *Bell vs. Morrison* would have been equally conclusive, omitting the remarks of Mr. Justice STORY, about the new cause of action.

In either view, the reasoning of the best considered cases applies with equal force in support of the bar of the statute.

Especially since the modern, and now the only prevailing, view is to regard the Statute of Limitations as a beneficial statute, as a statute of repose, one on which defendants have a right to rely with the same confidence as on any other statute, and the force of which should be extended rather than restricted. *Sm. Lead. Cases*, 980; *Angell on Limit.*, (6 Ed.,) 283-18 and 20; *Shoemaker vs. Benedict*, 11 N. Y., 176; *Winchell vs. Hicks*, 18 N. Y., 558; *Green, Executor vs. Johnson, et ux.*, 3 Gill & Johns., 394; *Fisher vs. Hamden, Paine*, 61.

By the demurrer and the second exception, the appellant raises the question whether a defendant who has signed his name as joint maker of a note, and who is in fact a surety, and is accepted by the payee as such surety only, cannot plead or offer in evidence the suretyship at law in a suit brought by the payee. *Yates vs. Donaldson*, 5 Md., 389; *Ives vs. Bosley*, 25 Md., 262; *Harris vs. Brooke*, 21 Pick., 195.

And if so, is not the statute a defence for such surety when he has not, within three years before suit brought, acknowledged the note in any way. *Angell on Limit.*, 218

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and 219; *Lowther vs. Chappell*, 8 Ala., 353; *Knight vs. Clements*, 45 Ala., 89; *Emmons vs. Overton*, 18 B. Monroe, 643; 1 Rob. Pr., 549, 560-1.

There is no moral consideration as to a surety.

Principal cannot bind surety by acts, &c. *Natl. Bank vs. Darragh*, 3 Thomp. & Cooke, 138; *Hunter vs. Robertson*, 30 Ga., 479.

This point is definitely settled on a case exactly like this, by *Smith vs. Caldwell*, 15 Rich., S. C. (Law,) 365, which was a case at law.

Surprised by a suit on a note on which he was only a surety, ten years after signing it, the equities in this case are all with the appellant.

*D. H. Wiles*, for the appellee.

The signing of the note created a joint obligation as between the party signing and Gates, the payee in the note, equally binding on each of the obligors for the payment of the sum specified in the note. *Whitcombe vs. Whiting*, 2 Dougl., 652, again announced in the case of *Wyatt vs. Hodson*, 8 Bingh., 300.

The American Courts have almost uniformly supported the same doctrine. In the case of *Hunt, Ex. vs. Bridgman*, 2 Pick., 581, the Court decided that "a partial payment made on a note by the principal promisor, will take the debt out of the Statute of Limitations as to the surety."

This point was subsequently affirmed by the same Court in *White vs. Hale*, 3 Pick., 291. But the leading case in which all the most noted authorities were based upon, is *Sigourney vs. Duirey, Jr.*, 14 Pick., 387, which was also based on a promissory note against several defendants, and the Statute of Limitations pleaded. The Court again decided that "the payment of interest by the principal promisor in a joint and several promissory note, annually, from the time the note was given, is sufficient to take

the note out of the Statute of Limitations as against the sureties."

The same principle has been announced as the law of Maryland.

In the case of *Ellicott vs. Nichols*, 7 Gill, 85, the Court reviewed the leading cases on the subject, and decided where one of the parties to a note makes a partial payment on the note before the Statute of Limitations applies, it renews the note against the other promisors, and the Court fully endorsed the rulings in the case of *Whitcomb vs. Whiting*.

"There is no difference between accommodation notes, and those negotiated for value." "The Court will look to the relation the parties bear to each other on the instrument itself, and determine their liabilities accordingly." *Clopper vs. Union Bank*, 7 H. & J., 92; *Yates vs. Donaldson*, 5 Md., 400 and 401.

The whole doctrine is fully reviewed in *Angell on Limitations*, commencing at sec. 248, and the notes thereto.

The third plea is a mere repetition of the second plea, being the Statute of Limitations, in a different form, provided the law would release from the payment of the note, upon the facts set forth in said plea; but admitting all the matters stated in said plea, as the demurrer does, still he would be liable, and hence the Court ruled correctly in sustaining the demurrer. The plea is put in on equitable grounds as stated. But there is no equity in it. It does not allege that time was given by the plaintiff to Middlekauff, without the consent of Schindel, and that he was in any manner injured or damnified by any act of the plaintiff. It merely asserts that he was surety, and that the Statute of Limitations applied, and that he never did anything, or in any manner authorized Middlekauff to do any act, or make any promises to remove the effect of the Statute of Limitations. In the case of *Sigourney vs. Duirey*, before cited, the Court say on page 398: "Some reliance was

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placed in the argument, upon the fact that the defendant, who pleads the present case, was a surety, and the consideration of hardship was strongly pressed upon the Court." "We have already remarked, that on a joint and several note *as to the promisee* all are principals."

"The case of *Hunt vs. Bridgham*, in Massachusetts, and most of the English cases cited, were those of sureties, and yet that circumstance was considered as making no difference upon the question of legal liability." "When a note is given with a surety, it indicates that the promisee wishes and means to have security; it indicates that it is intended for the accommodation of the principal; and with a view to such accommodation, it may reasonably be expected that it will continue beyond the particular time stipulated, and the law binds all parties till payment."

ROBINSON, J., delivered the opinion of the Court.

This case has been argued with commendable zeal and ability, but *Ellicott vs. Nichols*, 7 Gill, 86, is, we think, conclusive as to the question presented by the record.

Prior to Lord Tenderden's Act, and the Mercantile Law Amendment Act of 1856, it was settled in England, that part payment by one, of two or more joint and several makers of a note, was sufficient to prevent the bar of the Statute of Limitations, and this too without regard to whether such payment was made before or after the statute had attached. *Parkham vs. Raynal*, 2 Bing., 306; *Wyatt vs. Hodson*, 8 Bing., 309; *Rew vs. Pettit*, 1 A. & E., 196; *Burleigh vs. Stott*, 8 B. & C., 36; *Channell vs. Ditchburn*, 5 M. & W., 594.

This doctrine is stated by Lord ELLENBOROUGH to have had its origin with the case of *Whitcomb vs. Whiting*, decided in the King's Bench in 1781, in which Lord MANSFIELD said, the payment by one is payment for all, the one acting virtually for the rest, and in the same manner an admission by one is an admission by all, and the law

raises the promise to pay when the debt is admitted to be due.

In this country the decisions are quite conflicting. In some States the English rule is fully recognized and adopted, whilst in others the Courts hold that no such authority can be fairly implied from the relation of joint debtors, and that a payment by one of several joint makers, cannot in any manner operate to bind the others.

It is unnecessary to review the many cases on the subject—they are collected and reviewed in the notes to *Whitcomb vs. Whiting*, *Smith's Leading Cases*, vol. 1, 642.

In *Ellicott vs. Nichols*, this Court recognized a distinction between a payment made by one of several joint makers, before the statute had attached, and one made subsequent thereto. In the former, the payment was held sufficient to take the note out of the operation of the statute, but not so if the note had become barred.

The case of *Channell vs. Ditchburn*, 5 *Meeson & Welsby*, 494, in which it was decided that a payment by one of the makers of a joint and several promissory note, even after the statute had attached, was sufficient to take the case out of the statute, was considered by the Court, and Judge MARTIN said that the error of Baron PARKE consisted in his not discriminating between a payment of interest before and after the statute had attached. In the former case a payment by one of the makers of a promissory note might be regarded as a payment by all, because at the time of the payment the parties were jointly liable for the debt, and one might therefore be considered as the agent of the other with respect to the debt.

The Court also fully recognized the decision of *Whitcomb vs. Whiting*, and said that the part payment of principal and the payment of interest relied on to take the case out of the bar, was made within the legal time and before the statute had attached.

The rule thus laid down in *Ellicott vs. Nichols*, has been the accepted law of this State for nearly thirty years, and



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in the absence of legislation to the contrary, it is not to be questioned. It may not be amiss however to say, the same rule has received the sanction of the highest Courts in other States. *Sellman vs. Sellman*, 2 Hill, 416; *Steele vs. Jennings*, 1 McMullan, 297; *Gordy vs. Gilliam*, 6 Richardson, 28; *McIntyre vs. Oliver*, 2 Hanks, 209; *Walton vs. Robinson*, 6 Iredell, 341; *Emmons vs. Overton*, 18 B. Monroe, 643

In regard to the supposed hardship of the rule as against sureties to a note, the answer is, that it is always in their power to inquire whether it has been paid, and if it remains unpaid to compel the holder to proceed against the principal, or to pay the note and proceed in their own name.

The demurrer to the defendant's third plea was therefore properly sustained. The note in this case was a joint and several note, and the fact that the defendant signed it as surety, in no manner affected the plaintiff's right to recover. As between the defendant and the principal, the relation of the former as surety, was of course material, because the latter, if compelled to pay the note, had his remedy over against the principal, or if the note was paid by the principal such relation would protect the surety from any claim for contribution.

In this case the payments of interest were made from year to year by the principal, and before the statute had attached, and such payments were sufficient, in our opinion, to prevent the bar of limitations.

There was no error therefore, in granting the plaintiff's prayer, and in refusing the prayers offered by the defendant.

*Judgment affirmed.*

(Decided 13th June, 1877.)

GEORGE H. SMITH, JACOB WISNER, and others *vs.*  
STATE OF MARYLAND, use of THE COUNTY COMMISSIONERS OF BALTIMORE COUNTY.

*Principal and Surety—Motion to quash an execution on a judgment against sureties upon the ground of the release of a co-surety.*

Any valid contract or agreement between the creditor and the principal; or between the creditor and a surety without the concurrence of co-sureties, whereby the latter are subjected to an increased risk, operates as a discharge of such sureties.

The release of one or more sureties without the assent of the co-sureties will operate *at law* to discharge the latter.

In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect, unless it subjects the co-sureties to an increased risk or liability.

As between themselves the sureties are liable only for their proportion of the debt, and the right of contribution does not exist unless they have paid an amount exceeding this proportion.

A judgment was recovered against several sureties and the executrix of P. a deceased surety. The rateable proportion due by each defendant in the judgment was afterwards ascertained, and the amount due by P. was paid, and the judgment entered satisfied as against his executrix. Execution having been issued on the judgment as against the other sureties, on a motion to quash the execution, it was **Held** :

- 1st. That the payment of P's proportion of the judgment, and the subsequent entry of satisfaction as against his executrix, could not in any manner affect the rights of the co-sureties, or subject them to an increased liability.
- 2nd. That the effect of such entry, so far as they were concerned was to release them from the payment of P's proportion of the judgment, and, should any of the co-sureties prove insolvent, to release the others from the payment of P's proportion of the loss arising from such insolvency.

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3rd. That in summary motions of this kind Courts always exercise a *quasi* equitable jurisdiction, and will not therefore order an execution to be quashed if it appear, and upon a consideration of all the facts and circumstances of the case it would be against well settled principles of equity.

APPEAL from the Circuit Court for Baltimore County.

The case is sufficiently stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY and ROBINSON, J.

*Wm. S. Keech* for the appellants.

*L. P. D. Newman* for the appellee.

ROBINSON, J., delivered the opinion of the Court.

This is a motion to quash an execution issued on a judgment recovered by the appellee against the appellants and Mary Payne, executrix of B. N. Payne, sureties on the bond of Nelson Cooper, one of the tax collectors of Baltimore County.

At the request of one of the heirs-at-law of Payne a statement was made, showing the ratable proportion due by each defendant in the judgment, and, upon the payment of Payne's proportion as thus ascertained, the appellee directed the clerk to enter the judgment satisfied as against his executrix.

The appellants contend that, being co-sureties, the entry of satisfaction as against the executrix of Payne discharges them from all liability on account of said judgment.

Now, it is true that any valid contract or agreement between the creditor and the principal, or between the creditor and a surety, without the concurrence of co-sureties, whereby the latter are subjected to an increased risk, operates as a discharge of such sureties. And hence the

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release by a creditor of the principal, releases also the surety, because the latter is entitled, upon the payment of the debt, to be subrogated to all the rights and remedies of the creditor, and the creditor cannot, by his own act, prejudice or in any manner impair these rights without forfeiting his remedy against the surety.

It seems also to be well settled that the release of one or more sureties without the assent of the co-sureties will operate *at law* to discharge the latter, because it is a cardinal principle of suretyship that the surety has the right to stand by the very terms of the contract, and the creditor will not be permitted to change or alter the contract without concurrence of all the parties to it.

In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect, unless it subjects the co-sureties to an increased risk or liability.

Accordingly, it has been held that where the creditor releases one surety, reserving his remedy against the others, the effect of such release operates only to discharge the co-sureties from the ratable proportion which the surety thus released ought to have contributed, and such further proportion as he ought to have borne arising from the insolvency of any of the other sureties.

It is difficult to imagine on what principle it can be maintained in equity, that the mere release of one surety discharges the other sureties from liability.

As between themselves, the sureties are liable only for their proportion of the debt, and the right of contribution does not exist unless they have paid an amount exceeding this proportion.

If, then, the release of one surety discharges the others from the payment of the proportion of the debt, which such surety ought to have contributed, and discharges them also from the proportion which he ought to bear in the loss arising from the insolvency of any of the other

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sureties, it is clear that such release can in no manner prejudice or subject the co-sureties to an increased risk. It follows then from what we have said, that the payment of Payne's proportion of the judgment, and the subsequent entry of satisfaction as against his executors, could not in any manner affect the rights of the co-sureties, or subject them to an increased liability. The effect of that entry so far as they are concerned, is to release them from the payment of Payne's proportion of the judgment, and should any of the co-sureties prove insolvent, to release them from the payment of Payne's proportion of the loss arising from such insolvency.

In summary motions of this kind, Courts always exercise a *quasi* equitable jurisdiction, and will not therefore order an execution to be quashed if it appears upon a consideration of all the facts and circumstances of the case it would be against well settled principles of equity.

For these reasons, the motion to quash the execution, and strike out the judgment, were properly overruled.

*Judgment affirmed.*

(Decided 13th June, 1877.)

STATE OF MARYLAND, *ex rel.* JOHN C. HOLLAND, and  
others *vs.* THE COUNTY COMMISSIONERS OF BALTI-  
MORE COUNTY.

*Mandamus—Case where a mandamus was refused because the parties had a full and adequate remedy by appeal.*

By the Act of 1876, ch. 101, certain persons therein named were appointed a board of examiners, and empowered to make assessments upon owners of land lying on or near Wilkins avenue, for the purpose of constructing and completing said avenue. The commissioners were directed to make a report of their proceedings to the Commissioners of Baltimore County, for their ratification, amendment or rejection; and the Act further provides, that any person interested in the proceedings *might appeal* from the final order of ratification or rejection of the report of the examiners to the *Circuit Court for Baltimore County*. The examiners having made the assessments according to the provisions of the Act reported the same to the commissioners, and the latter being of the opinion that the Act of 1876, was unconstitutional, rejected the report, and passed an order quashing all the proceedings thereunder. **HELD:**

That a *mandamus* would not lie to compel the commissioners to carry out the provisions of the Act of 1876, as by the express terms of that Act the parties had a *full and adequate remedy by an appeal* to the Circuit Court for Baltimore County.

APPEAL from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Fielder C. Slingsluff*, for the appellant.

*John T. Ensor* and *Bernard Carter*, for the appellees.

State, *ex rel.* Holland, *et al.* vs. County Comm'rs of Balto. Co.

ROBINSON, J., delivered the opinion of Court.

By the Act of 1876, chap. 101, certain persons therein named were appointed a board of examiners, and empowered to make assessments upon owners of land lying on or near *Wilkins Avenue*, for the purpose of constructing and completing said avenue.

The examiners were directed to make a report of their proceedings to the Commissioners of Baltimore County, for their ratification, amendment or rejection, and the Act further provided that any person interested in the proceedings *might appeal* from the final order of ratification or rejection of the report of the examiners, to the *Circuit Court for Baltimore County*.

The examiner having made the assessments according to the provisions of the Act, reported the same to the commissioners, and the latter being of opinion that the Act of 1876, was unconstitutional, rejected the report and passed an order quashing all the proceedings thereunder.

Thereupon the appellants applied to the Circuit Court for Baltimore County for a writ of mandamus, to compel the commissioners to carry out the provisions of the Act of 1876, and this appeal is taken from a *pro forma* order of the Court refusing to grant the writ as prayed.

From this statement of facts, it is quite clear, the appellants are not entitled to the writ of mandamus, because by the express terms of the Act, they have a *full and adequate remedy by an appeal* to the Circuit Court for Baltimore County. This is not a case in which the commissioners have refused to perform an act commanded by law, for the contrary power was expressly vested in them either to ratify or reject the report of the examiners, and to all persons aggrieved thereby an appeal was provided to the Circuit Court of the county.

Entertaining these views the appeal must be dismissed.

*Appeal dismissed.*

(Decided 13th June, 1877.)

JUAN BOYLE *vs.* THE PEABODY HEIGHTS COMPANY OF  
BALTIMORE CITY.

*Construction of a Covenant to renew a lease, in which it was not expressed in terms when the renewed lease should commence.*

The Peabody Heights Company of Baltimore City, sub-leased certain parcels of ground to A. J. G., who afterwards assigned his interest to J. B. The deeds of sub-lease contained a covenant for renewal in these terms: "and also, that at any time during the continuance of this demise, the Peabody Heights Company of Baltimore City aforesaid, or its assigns, shall, and will, on payment to it or them of ten dollars as a fine therefor, execute and deliver, or cause and procure to be executed and delivered to the said A. J. G., his executors, administrators *or assigns*, at his or their request and cost, a new sub-lease of the above described parcels of ground and premises, or either of them, reserving to the said lessor a reversion of one day therein, which new sub-lease shall be subject to the same rents and contain the like covenants as are herein contained; and in particular a covenant for perpetual renewments, *so that this lease*, and the estates created thereby, and each and every of them shall be renewable, and renewed from time to time forever." **HOLD:**

- 1st. That like all other contracts the real intention of the parties to this covenant must control its interpretation.
- 2nd. That the purpose of the covenant was to preserve the lease for its original term, and the estates which it created, and to continue them forever.
- 3rd. That to accomplish this and carry out the intention of the parties, a new lease if required under this covenant, should be made to commence and take effect from the expiration of the original term.
- 4th. That the insertion of words in the covenant stating expressly when the new term should commence, was not necessary, if by other terms and provisions, and the character of the whole instrument the same intention was made to appear.
- 5th. That such intention was manifest upon the face of the said conveyance.



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On a bill filed by J. B. against the sub-lessor, claiming a renewal of said sub-leases to take effect at once, it was alleged that there were certain inaccuracies in the description of two of the lots, which the complainant was entitled to have corrected, it was **Held** :

That J. B. was not entitled to relief upon this ground without making the sub-lessee a party to the bill, and requiring him to be united in the new lease.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., MILLER and ALVEY, J.

*Frank Gosnell* and *T. M. Lanahan*, for the appellant.

Covenants are frequently inserted in leases where the landlord agrees to execute a new lease at some designated period.

"Under this covenant (to renew) the lessor is bound to make another lease, either to the lessee or *his assignee*; and if the terms of such covenant are express and unequivocal, the performance of it will be duly enforced by a Court of equity." *Taylor on Landlord and Tenant*, (3rd Ed.,) 224; section 332 of section V, and authorities there cited.

The contract in this case contains all the essential elements requisite to entitle the complainant to ask the assistance of a Court of equity to enforce it. "It is fair, just, reasonable, *bona fide*, mutual and certain in all its parts." *Stoddert vs. Bowie*, 5 Md., 35; *Gelston & Meyenberg vs. Sigmund*, 27 Md., 343.

"When a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for Courts of equity to decree specific performance of it, as it is for a Court of law to give damages for a breach of it; and Courts of equity will decree a spe-

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cific performance when the contract is in writing and is certain, and is fair in all parts, and is for an adequate consideration and capable of being performed." *Smoot vs. Rea & Andrews*, 19 *Md.*, 398, 405; *Moncrieff vs. Goldsborough*, 4 *H. & McH.*, 281; *Brewer vs. Herbert*, 30 *Md.*, 312.

It will be seen that the usual form of covenant for renewal in Maryland was not resorted to in this case, but a decided departure was taken therefrom by the original parties, and they adopted one of their own, not stating when the new sub-lease should begin.

"When no time is limited for the doing of the thing, it shall be done in a reasonable time." *Platt on Covenants*, (3rd Law Library,) top p. 65, marg. 145.

*E. Calvin Williams* and *John H. Thomas*, for the appellee.

The appellee's covenants only required it to execute such new sub-leases as were necessary and proper for the renewal of the terms created by its sub-leases to Gosman. This it offered to do. The new sub-leases demanded of it were not intended to be and would not have been a renewal, but a destruction of these which had been executed to Gosman. 1 *Platt on Leases*, 464; 2 *Platt on Leases*, 505-6-7; *Taylor on Landlord and Tenant*, sec. 340; *Thomas vs. Cook*, 2 *Barn. & Ald.*, 119; *Walker vs. Richardson*, 2 *Mees. & Wels.*, 882; *Collett vs. Hooper*, 13 *Vesey*, 260; *Lyon vs. Reed*, 13 *Mees. & Wels.*, 304-5-6; *Dodd vs. Acklen*, 6 *Mann. & G.*, 679. Gosman remained liable under his covenants, notwithstanding his assignments. The new sub-leases demanded of the appellant were intended to release him from that liability. *Taylor on Landlord and Tenant*, sec. 680; *Moale vs. Tyson*, 2 *H. & McH.*, 387.

If this be not, as is contended, the literal construction of the appellee's covenants, it is the spirit of them.

"Courts of equity determine the rights of persons according to the broad principles of justice and fair dealing, and

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not by technical and refined rules. They will carry out and perfect their contracts according to the real intention of the parties, under any given state of circumstances, independent of any narrow and technical rules of construction." *Maughlin vs. Perry*, 35 Md., 352-57-8-9; *Banks vs. Haskie*, 45 Md., 207.

Even Courts of law will, if necessary, reject words used in the most solemn instruments, if obviously inconsistent with the meaning of the parties. *Cooke vs. Graham's Adm'r*, 3 Cranch, 235; *Yeaton vs. Fry*, 5 Cranch, 335-42.

Specific performance is not a right to which one is entitled *ex debito justitiæ*. Courts of equity grant or refuse it as justice may require. *Maughlin vs. Perry*, 35 Md., 352-57; *Semmes vs. Worthington*, 38 Md., 299, 325; *Waters vs. Howard*, 8 Gill, 262-270; *Manning vs. Wadsworth*, 4 Md., 60-70; *Geiger vs. Green*, 4 Gill, 472-75-76; *Smoot vs. Rea*, 19 Md., 398-405; *Hamilton vs. Jones*, 3 G. & J., 127-131; *Taylor on Landlord and Tenant*, sec. 337; *Gelston vs. Sigmund*, 27 Md., 343.

Even if, therefore, the appellee's covenant, literally construed, was, as its counsel contend it was not, to execute such sub-leases as were demanded by the appellant, it relied on and contracted for the responsibility of Gosman for the rent, made no contract in reference thereto with the appellant, and justice would not be promoted by requiring it to forego the real consideration of its contract to give up a valuable responsibility for which it stipulated, and accept in lieu of it, a worthless one, not within its contemplation.

MILLER, J., delivered the opinion of the Court.

The appellee a corporation duly incorporated under the laws of this State, being the lessee for a term of ninety-nine years renewable forever, of certain real estate situated in Baltimore County, on the 5th of June, 1872, sub-leased several parcels of the same to Adam J. Gosman.

Afterwards on the 29th of June, 1876, Gosman assigned and conveyed these premises to Juan Boyle, the appellant. and he, on the 6th of September, 1876, filed a bill against the appellee, praying that the latter may be decreed to execute a new sub-lease to him of these premises. The main ground upon which this relief is asked, is that a covenant contained in the original sub-lease to Gosman, stipulates and provides for the execution of such new lease to his assignee. The covenant relied on is in these terms: "and also that at any time during the continuance of this demise the Peabody Heights Company of Baltimore City aforesaid, or its assigns, shall and will, on payment to it or them of ten dollars as a fine therefor, execute and deliver, or cause and procure to be executed and delivered to the said Adam J. Gosman, his executors, administrators or assigns, at his or their request and cost, a new sub-lease of the above demised parcel of ground and premises or either of them, reserving to the said lessor a reversion of one day therein: which new sub-lease shall be subject to the same rents, and containing the like covenants as are herein contained, and in particular a covenant for perpetual renewments, *so that this lease* and the estates created thereby, and each and every of them may be renewable and renewed from time to time forever."

The appellee admits its obligation under this covenant to execute a new lease, to take effect after the expiration of the term originally created, but denies that it is bound to execute a new lease such as the appellant demands, to take effect immediately and covering the same period of time as that covered by the original term. It contends, and there can be no question of the soundness of the position, that if the new lease demanded should be executed without making Gosman a party thereto, the original lease would be destroyed, and he would be absolved from his covenant to pay the rent, as well as from the other covenants on his part which that lease contains, whereas, if no such

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new lease be executed, he will remain liable on these covenants notwithstanding his assignment to the appellant. It is by reason of this effect of the new lease demanded the appellee resists its execution, and contends that by the true construction of the covenant relied on, no such obligation is imposed on the lessor. This requires us to ascertain the true meaning in this respect of the covenant in question. Like all other contracts the real intention of the parties to it must control its interpretation. The lease in which this covenant is contained conveys the property for all the rest and residue, save one year, of the term of years yet to come and unexpired of the lessor therein, and reserves a yearly rent of \$159.37½, on each of the parcels of ground thereby demised, and this rent, Gosman, the lessee covenants to pay, as well as all taxes or other assessments levied or to be levied or charged on the premises, or on the rents above reserved. It also contains a covenant, "that whenever either of the lots hereby demised are improved by the erection of such building or buildings as may be approved of by said company, and required by the conditions of this lease the company will execute to the said Adam J. Gosman, his executors, administrators or assigns, a good and sufficient original lease of said lot or lots of ground so improved, subject to the rent hereby reserved, with a covenant of renewal forever in the usual way such leases are prepared in the City of Baltimore, with a covenant also in said lease for the redemption of each of said rents at any time within eight years from the first day of January, 1872, on the payment of" a specified sum. Then follow provisions as to what character of buildings shall be erected, of what size, and how located. From these terms and conditions it appears the property was unimproved at the time this sub-lease was executed, and that the parties contemplated it should be improved, and that when the improvements were made by which payment of the rent would be more effectually secured, it

should be superseded by an original lease placing the sub-tenant on the footing of an original lessee for ninety-nine years, renewable forever, with the privilege to redeem the ground rent, and make himself owner in fee within a specified time. In that state of case and until the improvements were made, it was important as well as natural and reasonable for the lessor to lease to a responsible tenant upon whose ability to pay the rent he could depend, and not to bind himself in this temporary arrangement by any covenant, by which the lessee, if dissatisfied with his bargain could escape from that responsibility; and it is also fair to presume, that when the lessee took this lease he contemplated making the improvements, and was unwilling when he made them to be held to the position of a mere sub-lessee, but desired and stipulated for the better status of an original lessee, with the privilege of becoming the fee-simple owner of the improved property. That, we think, was the intention of both parties to this instrument when it was executed. In our opinion it was its chief design to subserve the temporary purpose we have indicated, viz., to secure to the lessor the payment of the rent until the improvements were made, through the personal liability of a responsible tenant, and then to give to the latter the rights and privileges of an original lessee with a redeemable ground rent. Now is there any thing in the terms of this covenant which forbids a Court to place this construction upon it, and compels the opposite construction under which it would be quite competent for Gosman to escape all liability by assigning to an irresponsible party, and then inducing the party to demand and enforce the execution of a new lease to himself as assignee? We think not. On the contrary, by a fair reading of this covenant it seems to intend that the new leases for which it provides shall have the effect to *preserve* and not to *destroy* the original lease, and that is manifested by the terms, "so that *this lease* and the *estates created thereby*, and each and every of

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them may be *renewable and renewed from time to time forever.*" This is the governing and controlling clause of the whole covenant, and expresses the purpose for which it was entered, viz., to preserve the lease for its original term, and the estates which it creates, and to continue them forever. To accomplish this and carry out what seems to us to have been the intention of the parties, a new lease if required under this covenant, should be made to commence and take effect from the expiration of the original term. It is usual to make an express stipulation to this effect where there is an original lease creating a term for ninety-nine years renewable forever, and upon the omission thus to state expressly when the new term should commence, is founded the main and strongest argument on the part of the appellant, that the parties here had a different intention. But the insertion of these words is not essential if by other terms and provisions, and the character of the whole instrument, the same intention is made to appear, and that intention is, in our judgment, manifest upon the face of this conveyance. We therefore sustain the appellee's construction of this covenant.

The other ground upon which the appellant claims relief in his bill, is that the lines of two of the lots described in the lease to Gosman, are so inaccurately and vaguely run that it is uncertain what property if any passes thereby. Under the construction we have placed upon the covenant for new leases, it is obvious, the appellant is not entitled to relief upon this second ground, without making Gosman a party to the bill and requiring him to be united in the new lease, by which the mistaken or inaccurate description may be corrected. And the appellee has consented, and makes no objection to the new lease to which Gosman shall be a party, in order to remedy any such defective description, we must affirm the decree appealed from, which dismisses the bill with costs.

*Decree affirmed.*

(Decided 14th June, 1877.)

## PATRICK McGRATH vs. STATE OF MARYLAND.

*Questions as to the Constitutionality of the Act of 1874, ch. 221, on the ground that the subject of the Act was not described in the title, and because it was a Special Act—Construction of said Act—Evidence.*

The entire subject of the Act of 1874, ch. 221, relating to the measuring of oysters sold in the shell, is in strict conformity with its title, and not in contravention of the Constitution, Art. 3, sec. 29, which provides that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title."

The object of the Act was to prevent fraud on the *buyer by short measure*, and to prevent fraud on the *seller by over measure*, and is neither a special law within the meaning of the Constitution, Art. 4, sec. 33, which provides that "the General Assembly shall pass no special law for any case for which provision has been made by an existing general law," nor was there at the time it was passed, a general law on the subject.

Under an indictment for disposing of oysters by heaping measure, and not by even and struck measure, the evidence showed that the oysters were taken from a vessel, measured in tubs by heaping measure and thence taken to the packing house of F. & Co. **HELD :**

That in the absence of proof to the contrary it was but fair to presume that the oysters were sold to F. & Co.

Evidence was offered to prove that from the nature of oysters in the shell, as brought from the bed, it was impossible to measure them by even or struck measure. **HELD :**

That this evidence was irrelevant unless accompanied by an offer to prove, that bunch oysters could not be separated for the purpose of measurement as required by the Act.

The Act of 1874, ch. 221, requires oysters in the shell to be measured at certain designated places, in an iron tub of certain dimensions, and that the measure shall be even or struck measure. It further provides, any one violating the provisions of the Act shall be guilty of a misdemeanor, &c. **HELD :**

That the measuring of oysters in the shell by *heaping measure* is a violation of the provisions of this Act.



APPEAL from the Criminal Court of Baltimore City.

The case is stated in the opinion of the Court.

*First Exception.*—The only evidence as to the *disposition* of the oysters was, that after they were measured they were taken from the vessel where they were measured, into the oyster packing house of Farren & Co., and dumped down on the floor or into the opening boxes.

The traverser thereupon moved the Court to instruct the jury, that there was no evidence legally sufficient to find the traverser guilty, there being no evidence that the oysters referred to in the testimony were disposed of within the meaning of the statute.

The Court, (BROWN, J.,) overruled the motion, and the traverser excepted.

*Second Exception.*—After the testimony set out within the first bill of exceptions, the traverser offered to prove by several witnesses who have been for years engaged in the oyster business, that from the nature of oysters in the shell, as brought from the oyster beds, it is not possible to measure them by even or struck measure, owing to the fact that they cannot be made to lie in the measure so as to be even with the top of the measure, and if the measure be struck so that no oysters project above the top. there will be depressions and cavities which will make the measure short; that among oysters when brought from the beds there are many bunches in boxes, consisting of a number of shells united together, containing only one or two oysters; that these bunches are large sometimes, and that it would be impossible to strike a measure containing such bunches, without removing the bunch, which would make a large cavity in the vessel. The Court rejected the evidence, and the traverser excepted.

The jury rendered a verdict for the State. The traverser appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, ALVEY and ROBINSON, J.

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McGrath vs. State.

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*H. Stockbridge*, for the appellant.

*Attorney General C. J. M. Gwinn*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

The appellant, a licensed measurer of oysters in the shell, for Baltimore city, was convicted of violating the provisions of the Act of 1874, chap. 221.

It is contended in the first place, that the Act of 1874 embraces matters and aims at results not described in its title, and does not therefore conform to the requirements of sec. 29, Art. 3 of the Constitution of this State, which declares that "Every law enacted by the General Assembly, shall embrace but one subject, and that shall be described in its title."

Now, although the object of the title of an Act is to indicate to a certain extent the nature and character of the legislation to be found in the body of the law, yet it is well known, that formerly it constituted no part of the law itself. It is true, in some cases, it served as a guide in ascertaining the intention of the Legislature, when such intention was not expressed in clear and unambiguous terms, but it could not enlarge or restrain the plain provisions of the law. And hence it was no uncommon thing to find an Act embracing distinct subjects foreign to, and independent of each other; and in regard to which the title afforded no clue whatever. In addition to this, it is well known, that measures of a different character were often embodied into one Act, for the express purpose of securing the combined support of the friends of each, and thus members were often induced to vote for measures which if offered as independent measures, would not have received their support. It was to remedy these evils, that the constitutional provision was adopted.

The Act of 1874 is not, however, liable to this objection. The title of the Act is "to repeal chapter 193 of the Acts

of 1872, and re-enact the same with amendments, so that oysters sold in the shell at Baltimore, Crisfield, and at all packing establishments, shall *be measured in an iron measure.*" Now there is nothing to be found in the body of the Act at variance with, or foreign to the subject-matter thus indicated by the title. It provides that oysters in the shell disposed of in the City of Baltimore or in the port of Crisfield, or at any packing establishment in this State, shall be measured by a licensed measurer, in an iron circular tub, of a certain description, and that the measure *shall be even or struck measure.* The entire subject of legislation to be found in the body of the Act is in strict conformity with the title.

Then again, it is urged that the Act is a special Act, and in contravention of sec. 33, Art. 4 of the Constitution, which provides that "the General Assembly shall pass no special law for any case for which provision has been made by an existing general law." The object of this provision was to prevent special legislation in special cases, but it is difficult to imagine on what principle the Act in question can be said to be liable to this objection. Here is a law which provides for the measurement of oysters in the shell at certain designated places, and at all packing establishments in the State. It operates alike upon all persons at the places named in the Act. The purpose of the Legislature was to prevent fraud on the *buyer by short measure*, and to prevent fraud on the *seller by over measure.* It is neither a special law within the meaning of the Constitution, nor was there at the time it was passed a general law on the subject.

But it was also contended that there was no evidence legally sufficient to prove that the oysters measured by the traverser, were "disposed of" as required by the Act, or in other words, that they were sold. Now the evidence shows that they were taken from the vessel, measured in iron tubs or by heaping measure, and thence taken to the pack-

ing house of Farren & Co. In the absence of proof to the contrary it was but fair to presume that the oysters were sold to Farren & Co.

The last exception is taken to the rejection of the evidence offered by the appellant to prove that from the nature of oysters in the shell as brought from the bed, it was impossible to measure them by even or struck measure, but there was no offer to prove that bunch oysters could not be separated for the purpose of measurement, as required by the Act.

In addition to these exceptions to the rulings of the Court, the traverser demurred to, and also moved to quash the indictment, both of which were overruled.

The Attorney General contends that the questions arising on the demurrer, and motion to quash, are not before us for review, and that since the adoption by this Court of the rules relating to writs of error, such questions can only be raised after judgment, by petition addressed to the Court in which the case was tried, plainly designating the points or questions, by the decision of which, the petitioner felt aggrieved. But these questions are properly presented in the case of *The State vs. Frazier*, and we might as well dispose of them here.

We have already considered the question in regard to the constitutionality of the law, and the only remaining inquiry is, whether the indictment sets forth an *indictable offence*. And this is rather too plain to admit of contention. The Act of 1874, requires oysters in the shell to be measured at certain designated places in an iron tub of certain dimensions, and that the measure shall be even or struck measure. It further provides "that any one violating the provisions of this Act shall be guilty of a misdemeanor," &c. The indictment charges the traverser with unlawfully measuring oysters in the shell, by "*heaping measure*," and not by "*even and struck measure*." The measuring of oysters in the shell by *heaping measure*,

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is certainly a violation of the provisions of the Act, which requires they shall be measured by *even or struck measure*.

For these reasons the rulings below will be affirmed.

*Rulings affirmed.*

(Decided 14th June, 1877.)

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JULIA BROWN, Assignee of JAMES W. GREEN vs.  
PHILIP F. THOMAS and E. B. BATES, Trustees,  
and others.

*Assignment—Effect of the decree in determining the rights of the parties to it—Practice in Equity, as to the manner of coming in as assignee of the share of a distributee and excepting to the auditor's account—Practice in the Court of Appeals under the Code, Art. 5, secs. 26 and 28.*

A bill was filed for the sale of real estate for the purpose of partition. F. G. one of the defendants by his answer denied all rights of the complainants in the land, and claimed exclusive right thereto by adverse possession. J. W. G. a younger brother of F. G. by his answer stated, that if he ever had any interest in the real estate mentioned, he was fully satisfied that it had been more than consumed and exhausted in his board, maintenance and education furnished by his brother F. G., and that he set up no claim of right to or interest in the land. Subsequently a decree was passed for the sale of the land for the purpose of partition among the parties. In the written opinion of the Court, in reference to which by express terms the decree was passed, it was declared that F. G. "should be allowed nothing for the support and maintenance of his brothers and sisters, he having been fully compensated by their labor, the fruits of which he enjoyed, for all trouble taken and expense incurred in their behalf." Upon the filing of the auditor's report distributing the proceeds of the sale made under this decree, J. B. without the formality of petition, appeared in the cause for the first time, and describing herself as assignee of the interest of J. W. G., excepted

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to the auditor's accounts, because the distributive share of J. W. G. was treated by the auditor as assigned to F. G. This exception was filed on the 7th of March, 1876. The only evidence of the assignment by J. W. G. to J. B., was a paper purporting to be executed on the 22nd of May, 1876, and the same day filed in the cause. There was no proof whatever of the execution of the paper, nor was it in any manner admitted or recognized by the parties to be affected by it, so as to justify the Court in receiving it as evidence. On appeal by J. B. from an order of the Court below overruling her exception, it was **Held** :

- 1st. That the answer of J. W. G. did not operate as an equitable assignment of his interest to his brother F. G.
- 2nd. That the decree in directing the sale of the land for the purpose of partition among the parties to the cause contemplated, J. W. G. as one of the parties entitled to receive distribution of the proceeds of sale.
- 3rd. That reading the decree in connection with the opinion to which it refers, the idea of an assignment of J. W. G.'s interest to F. G. in consideration of support and schooling furnished is entirely excluded.
- 4th. That J. B. was not in a position to insist that the distribution to J. W. G. should be awarded to her as assignee, because she had not made herself properly a party to the proceedings, and had established no claim to the fund.
- 5th. That the assignment being filed in the cause at the time and in the manner it was, no exception was required to its admissibility in the Court below to exclude it from consideration in this Court, under the Code, Art. 5, sec. 26.
- 6th. That although J. B. had failed properly to present her claim under the assignment, (supposing it to be susceptible of proof,) and had furnished no complete proof upon the subject, yet there was enough in the record of which this Court could take notice, to justify it in remanding the cause without reversing or affirming the order appealed from, for further proceedings under the Code, Art. 5, sec. 28.
- 7th. That the audit might however be at once ratified except as to the distribution claimed by J. B. as assignee.

**APPEAL** from the Circuit Court for Caroline County, in Equity.

The case is stated in the opinion of the Court.

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The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY and ROBINSON, J.

*John B. Brown* and *George M. Russum*, for the appellant.

*Edward B. Bates* and *Philip F. Thomas*, for the appellees.

ALVEY, J., delivered the opinion of the Court.

This appeal is taken from an order of the Circuit Court for Caroline County, as a Court of Equity, overruling an exception of the appellant to an auditor's account, and ratifying the account to the exclusion of the appellant's claim.

The bill was filed for the sale of certain real estate for the purpose of partition among the parties to the cause. Foster Green and James W. Green, together with several others, were made defendants. Foster Green, by his answer, denied all right of the complainants in the land, and claimed exclusive right thereto by adverse possession. James W. Green, a younger brother of Foster Green, by his answer, stated that he was ignorant of the facts charged in the bill, being, at the time of their occurrence, an infant; and that if he ever had any share in the real estate mentioned, he was fully satisfied that it had been more than consumed and exhausted in his board, maintenance, and education, furnished by his brother, Foster Green; and that he set up no claim of right to or interest in the land.

Proof was taken, and the case submitted to the Court, and in March, 1872, a decree was passed for the sale of the land, for the purpose of partition among the parties, and that Foster Green should account for rents and profits. In the written opinion of the Court, in reference to which by express terms the decree was passed, it was declared that Foster Green "should be allowed nothing for the support

and maintenance of his brothers and sisters, he having been fully compensated by their labor, the fruits of which he enjoyed for all trouble taken and expense incurred in their behalf." This decree was never appealed from, and consequently it remains in full force. The land was sold by trustees under the decree in April, 1874, and the sale was finally ratified by the Court. The case was then sent to the auditor, who stated several accounts, both of rents and profits and the proceeds of sale. In these accounts the distributive share of James W. Green is treated as having been assigned to Foster Green. Upon the filing of the auditor's report the appellant, without the formality of petition, appeared in the cause for the first time, and, describing herself as assignee of the interest of James W. Green, excepted to the auditor's accounts, because the distributive share of James W. Green was treated by the auditor as assigned to Foster Green. This exception was filed on the 7th of March, 1876, and to which the complainants interposed several objections, among others, that the appellant had not rightfully and properly appeared in the cause, and had not properly presented her claim, or the evidence of the assignment under which she made claim. The only evidence of the assignment is a paper purporting to be executed on the 22nd of May, 1876, and the same day filed in the cause,—some two months and a half after the exception was filed. There is no proof whatever of the execution of the paper, nor has it been in any manner admitted or recognized by the parties to be affected by it, so as to justify the Court in receiving it as evidence. But the Court below, taking the view that the answer of James W. Green operated as an equitable assignment of his interest to Foster Green, overruled the exception of the appellant, without at all passing upon the evidence of his title. The auditor's account distributing the share of James W. Green to the use of Foster Green was finally ratified, and it is from that order that the appeal is taken.



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We are decidedly of opinion that the Court below was in error in supposing that the answer of James W. Green operated as an equitable assignment of his interest to his brother Foster Green. The only consideration that is suggested for such an assignment is the furnishing of board, maintenance, and schooling; but, as we have seen, the Court determined that Foster Green should be allowed nothing on that account, and the decree must be taken as conclusive upon that subject. In the case of *Pfeltz vs. Pfeltz*, 1 Md. Ch. Dec., 455, a decree was passed for the sale of property, for the purpose of partition among the parties to the cause, as in the present case; and after enrollment of the decree, a petition was filed by one of the parties, setting up an exclusive right to the whole proceeds of sale; and the Chancellor held, that as the decree contained no reservation of equities, it was of course final upon the rights of the parties, and the petition was dismissed. In this case, it was not questioned, after the defences set up by Foster Green were held to be groundless, but that James W. Green held an estate in the land in common with the other parties to the bill; and it is quite clear that the decree, in directing the sale of the land for the purpose of partition, not among those who might thereafter be shown to be entitled, but among the parties to the cause, contemplated James W. Green as one of the parties entitled to receive distribution of the proceeds of sale. Reading the decree in the light of the opinion to which it refers, all idea of an assignment of James W. Green's interest to Foster Green, in consideration of support and schooling furnished, is entirely excluded.

But, notwithstanding there was no assignment of the interest to Foster Green, the appellant was not in a position to insist that the distribution to James W. Green should be awarded to her as assignee. She had not made herself properly a party to the proceedings, and had established no claim to the fund.

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By the practice as established in the English Chancery, a person, not a party to the cause, becoming assignee *pendente lite*, may apply by petition for an order to protect the fund subject to the assignment, and that he be allowed to attend under the decree, and except to the Master's report; but such order is always at the expense of the assignee. 2 *Danl. Ch. P.*, 1312, 1517. With us the practice is of a less formal character than in England; but such assignee, under our practice, in a case like the present, is required to present his claim by petition, and establish his title by legal and competent evidence, before he can claim an order securing to him the benefit of the assignment. For precedents of such practice in analogous cases, we may refer to *Maccubbin vs. Cromwell*, 2 *H. & Gill*, 443; *Duvall vs. The Farmers' Bank of Md.*, 4 *Gill & J.*, 282, 294; *Hays vs. Miles*, 9 *G. & J.*, 193, and *Balch vs. Zentmeyer*, 11 *G. & J.*, 267, 282. These cases would seem to have established the practice as we have stated it. But here there was no petition filed setting forth the claim, and the facts upon which it was founded; and the assignment did not prove itself; and being filed in the cause at the time and in the manner it was, no exception is required to its admissibility in the Court below to exclude it from consideration in this Court, under the *Code*, Art. 5, sec. 26; *Stockett vs. Jones*, 10 *Gill & J.*, 276; *Eyler & Matthews, vs. Crabb*, 2 *Md.*, 137, 154.

The only person complaining of the order appealed from is the appellant, and if the assignment to her be not established, the order ratifying the auditor's account should stand. And though the appellant has failed properly to present her claim under the assignment, (supposing it to be susceptible of proof,) and has furnished no competent proof upon the subject, yet there is enough in the record, of which we can take notice, to justify this Court in remanding the cause, without reversing or affirming the order appealed from, for further proceedings, under the

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Code, Art. 5, sec. 23. That was the course pursued, in respect to rights informally and imperfectly appearing in the cases of *Darnall vs. Hill*, 12 *G. & J.*, 388, and *Eyler & Matthews vs. Crabb*, 2 *Md.*, 154, and justice would seem to require its adoption in this case. The appellant can then present her claim by petition and establish it by proof. There is no reason, however, why there should be any delay in ratifying the audit as to all the distributions except that to James W. Green, claimed by the appellant. The other distributees should neither be burthened with costs, nor prejudiced by delay, in consequence of the intervention of the appellant, if they interpose no active resistance to the assertion of her claim. The audit may, therefore, be at once ratified except as to the distribution claimed by the appellant as assignee.

*Cause remanded  
for further proceedings.*

(Decided June 14th, 1877.)

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## ADVANCEMENT.

1. In this State, as in England, a gift of money or property by a parent to a child is presumptively an advancement, but this presumption may be repelled or rebutted by evidence proper for the purpose. *Graves, et al vs. Spedden, et al.*, 527.
2. Whether such a gift takes the character and legal properties of an advancement, or those of a full and absolute gift without a view to a portion or settlement, depends on the intention of the donor. *Ib.*
3. And that intention may be ascertained by parol evidence of the donor's declarations at the time of executing the conveyance or making the gift, or of the donee's admissions afterwards; or by proof of facts and circumstances from which the intention may be inferred. *Ib.*
4. A father in consideration of natural love and affection, conveyed by deed his home farm to his three sons, R., W. and C. on condition, that it should never be sold out of his family, and reserved to himself

ADVANCEMENT—*Continued.*

a life estate therein. It was not expressed in the deed whether the conveyance was intended as a gift or an advancement. **HELD:**

That neither the restriction upon alienation, nor the reservation of a life estate indicated any intention to make it other than an advancement. *Ib.*

5. A bill was filed by R. against his brothers and sisters, and the children of two deceased sisters, for a partition of the other real estate of which the father died seized and intestate. The daughters averred in their answers, that the three sons, R., W. and C. were advanced in their father's life-time by the conveyance to them of his home farm, and that H. the other son had borrowed of his father \$1500 secured by his notes, which his father in his life-time had destroyed with a view of giving this sum of money to H. as an advancement; and they asked that these advancements might be brought into the estate for division with the other property. The complainant R. was called as a witness by his brothers, who were some of the defendants to the bill, but had the same interest in the question at issue as himself. This witness after stating several previous conversations with his father, in which the latter expressed his wish to deed the farm to his three sons to whom it was afterwards conveyed, testified in substance, that his father gave him written instructions for the preparation of the deed, and assigned as a reason for giving his boys more than his girls, that both his grandfathers had done so, and added "You boys have made the most of my money, and I am determined you shall have the most of it, and you are standing in your own light in not having the deed prepared." That witness went to town the following Monday, and got the deed prepared. On the next day he took the deed over to his father who approved it, and said, "When this deed is executed I am going to destroy H's notes." Witness then said to him, "I thought you once said H. had gotten his part." To which his father replied, "I did say so, but there has something accumulated since, and I have changed my mind," and further said, "When I destroy H's notes, it will make him fully equal with you and W. in the land, but not quite as much as C." That his father then also said, "I want you boys to have that *much more* than the girls, and *all the rest* of my property I want divided *equally among all my children*; this will give you \$1000 or \$1200 a piece, and that will be a nice little present for each of you." That his father then appointed the following Saturday, which was the usual business day in that part of the county, for the execution of the deed, but finding the magistrate was from home, he afterwards postponed it until the next Saturday; on which day the deed was executed and delivered to witness to get it recorded, which was done. **HELD:**



ADVANCEMENT—*Continued.*

- 1st. That said declarations were part of the *res gesta*, and properly received in evidence for the purpose for which they were offered.
- 2nd. That the declarations respecting the gift to his son H. by the destruction of his notes, being made at the same time and under the same circumstances, were of the same character.
- 3rd. That the declaration of his intention to destroy these notes at the time the deed was executed, coupled with the facts, proved in the case, that they were never afterwards seen in his possession, nor found among his papers after his death, justified the inference that he then destroyed them.
- 4th. That the sufficiency of these declarations to repel the presumption that these gifts were advancements to the sons could not admit of doubt.
- 5th. That the complainant was competent to prove on his own offer the declarations made to him by his father.
- 6th. That the declarations proven by him did not constitute a *cause of action* upon which the father if living could have been sued; nor did they constitute or evidence, in the legal sense of the term, a *contract* between the party making them and the party to whom they were made.
- 7th. That the said declarations constituting part of the *res gesta* were verbal acts, and might be proved by the same witnesses, whom the law has made competent to prove other facts relevant to the issues made up in the pleadings.
- 8th. That their tending to establish a fact that would carry the point in dispute in favor of the party testifying, did not disqualify him, the statute having removed the disqualification of interest.
- 9th. That it made no difference that the declarations were made by a party who was dead at the time they were proven. *Ib.*

## ADVERSE POSSESSION.

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## AGENCY.

*See* PRINCIPAL AND AGENT.

## AGREEMENT.

1. J. L. and W. B. L. of the City of Baltimore, entered into the following agreement:  
 "Whereas, the said W. B. L. is desirous of carrying on and conducting the retail liquor business, at 51 East Lombard street, in said city, but is unable to do so, because of his inability to furnish stock and capital necessary in said business; and whereas, said W. B. L. is

AGREEMENT—*Continued.*

without means of his own, the said J. L. has consented to aid him upon the terms and conditions hereinafter named.

"Now this agreement witnesseth, that the said J. L. agrees to furnish and deliver to said W. B. L., as his agent, all such liquors, wines, &c., which he may require in said business, at the usual wholesale prices, so long as it shall be agreeable for him to do so, and said W. B. L. shall faithfully comply with this agreement. It is expressly understood and agreed, however, that said W. B. L. shall conduct and carry on said business only as the agent of said J. L., that the stock in trade furnished as aforesaid shall be and remain the absolute property of the said J. L., and that all goods shall be sold for and on the account of said J. L., and all bills for goods sold shall be made out in the name of said W. B. L., as agent aforesaid, and in no other manner; and said W. B. L. shall account to said J. L., at least once a month, for all goods delivered to him under this agreement, and shall pay over the wholesale price of such goods, and retain for his labor and attention in said business such profits as shall be made." *Albert, Sheriff vs. Lindau*, 334.

2. In an action brought against the Sheriff of Baltimore City, by J. L. for an alleged illegal seizure and sale of goods in the store of W. B. L. under executions against the latter, and which goods the plaintiff claimed as his under the above agreement. **HELD:**

- 1st. That although there were some features in this instrument of an unusual character, and tending to arouse suspicion as to its *bona fides*, the Court could not pronounce it void upon its face.

- 2nd. That there was no legal principle which would make void an agreement like this, if executed and carried out in good faith.

- 3rd. That upon the assumption that it was so executed, and was thus being carried out, and that the goods levied on by the sheriff at the instance of the judgment creditors, were duly furnished under it, and were in the store at the time of the levy, there was no reason why he should not be responsible for seizing and selling them, said creditors having recovered their judgments more than two years before the agreement was entered into.

- 4th. That the case would be quite different with respect to subsequent creditors, who might be fairly presumed to have been misled by the false credit which such possession and ownership might give.

- 5th. That under the above assumption, the plaintiff was entitled to recover the value of the goods seized, provided the same *did not exceed the amount* owing to him by W. B. L. under the agreement, with interest in the discretion of the jury.

AGREEMENT—*Continued.*

6th. But if the goods were in fact sold to W. B. L. *on credit*, instead of being entrusted to him for sale *as agent*, or if the agreement referred to was merely colorable, not made in good faith, and was intended to be used for the purpose of protecting property, which was actually sold to and belonged to W. B. L. from his creditors, under the guise of an agency, then the goods could be seized on execution both by his antecedent and subsequent creditors.

7th. That if J. L. delivered the goods in the store to W. B. L. at a *fixed price*, being the wholesale market price for such goods at the time of delivery, and charged the same to W. B. L. on his books, and authorized him to sell and dispose of them as if they were his own, and W. B. L. was to receive all the profits of such sales, and *was to sustain all losses* arising therefrom, or which might be incurred by injury to or destruction of the goods, and was not to receive any commission or salary, and was *never required to account* for such sales, nor to render any account of the same from time to time, except that he was simply *to pay for the goods* the prices charged on the books of J. L., (the same being the wholesale price of the same,) and in the bills for the goods sent to W. B. L. by J. L. at the time of delivering the same, and said bills so rendered, were in the ordinary form of sale bills made out to a purchaser of goods,—then there was in effect a waiver or an abandonment of the agency contract, and the protection it would otherwise have afforded to J. L.'s asserted ownership of the goods, and constituted in law a sale of them on credit accompanied by delivery.

8th. That where all the elements of such a sale exist it cannot be made anything else by calling it by a different name.

9th. That if the contract with W. B. L. was merely colorable, not made in good faith, but intended to conceal the property from the creditors of said W. B. L. in order to deprive them of his future earnings, the said delivery of said goods as far as the creditors of said W. B. L. were concerned vested the property in said goods, in said W. B. L., and the same could be taken on execution by his creditors. *Ib.*

*See* COVENANT, 1.

## ALLEGATA AND PROBATA.

*See* PLEADINGS, 5.

## ANSWER.

*See* ASSIGNMENT, 2.

## APPEAL.

1. No appeal lies from the judgment of a Circuit Court affirming a judgment of the justice of the peace, unless it affirmatively appears from the record that the justice rendering the judgment, and the Court affirming it upon appeal were without jurisdiction in the case. *Cole vs. Hynes, et al.*, 181.
2. Where it appears from the record that the plaintiff below voluntarily suffered a judgment of *non pros.* and no final judgment was entered in the cause, no appeal lies. *Boyd, et al. vs. Kienzle, et al.*, 294.
3. By the Act of 1872, ch. 316, an appeal is given in criminal cases, but only from rulings and determinations of the Court in the course of the trial, *as is practiced in civil cases.* *Kearney vs. State*, 422.
4. But where bills of exception are taken and an appeal is prosecuted under the Act, the final judgment is required to be withheld or suspended until the questions presented by the bills of exceptions are decided by the Court of Appeals. *Ib.*
5. Where no exceptions are taken no appeal lies under the Act; the right of appeal under that statute, being confined exclusively to the cases where exceptions are taken in the course of the trial. *Ib.*
6. An order overruling a demurrer to an indictment, is not the subject of a bill of exception, and therefore is not within the provisions of the Act of 1872, ch. 316. *Ib.*
7. That ruling, could properly, only be reviewed on writ of error, or a proceeding in the nature of a writ of error, as prescribed by Rule 1, for the Regulation of Appeals to this Court, 29 *Md.*, 1; and which could not be resorted to or availed of by the party until there is a final judgment against him. *Ib.*
8. On appeal from an order overruling a demurrer to an indictment taken after verdict and before any judgment was rendered, it was HELD :
  - 1st. That the case was not in a condition to be removed by writ of error, or proceeding substituted for that writ, and the appeal must be dismissed.
  - 2nd. That when the final judgment should have been rendered, it would be competent for the accused to take the proceeding substituted under the rule for the formal writ of error. But it would be done by virtue of his right at common law, and not under the Act of 1872. *Ib.*

See ASSIGNMENT, 2.

ELECTIONS, 1.

MANDAMUS, 2.

## ARBITRATION AND AWARD.

1. J. B. having a contract with the Board of Directors of the Penitentiary, under which he was entitled to carry on the manufacture of harness

ARBITRATION AND AWARD—*Continued.*

at that institution, entered into an agreement with G and B. to unite with them in partnership in carrying on the business. During the partnership, G. and B. filed a bill against J. B. charging him with a violation of his agreement, and asking for a dissolution, account, &c. Whereupon an agreement was entered into for the settlement of all matters in controversy between them, by which among other things, it was agreed, "that all matters appertaining to, or connected with the business in which the said parties have been engaged together in the Penitentiary, under the contract with the Directors thereof, and also under the contract between themselves," should be referred to two arbitrators with power to choose an umpire in case of disagreement, "the said arbitrators to have access to the books and papers belonging to the concern, and to ascertain and determine finally the precise interest of each party in business." Under this reference an award was made directing, that "*J. B. pay to G. as the portion of the profits due to him, and of the losses by him sustained by the neglect and refusal of J. B. to keep and abide by his contract with the said G., in relation to the said business conducted by them in the Penitentiary, the sum of \$3967.28; and for the like contract as the profits and damages justly owing, and arising out of the same, that the said J. B. pay to B. as owing to and sustained by him the sum of \$3850.78.*" On a bill filed by J. B. to have said award set aside. **Held:**

- 1st. That the award embraced matters not within the terms of the submission.
- 2nd. That the arbitrators were not authorized to decide upon any claims of damages made by G. and B., based upon matters not included in the partnership transactions and business. *Bullock, et al. vs. Bergman, 270.*
2. The proof showed that the arbitrators took into consideration the claims made by G. and B., for alleged damages resulting to them from discontinuing the business; and included in the sums awarded to G. and B. an estimate of the profits, which they supposed might have been made by G. and B. if the business had been continued till the contract of J. B. with the Directors of the Penitentiary would have terminated. **Held:**
  - 1st. That damages estimated upon such a basis, are altogether speculative and of too uncertain a character to be sanctioned by the Courts.
  - 2nd. That the subject-matter out of which they are supposed to have arisen, was not one submitted to the arbitrators, and they exceeded their authority in making it the ground of their award.
  - 3rd. That while Courts regard awards with favor, and every intendment is made for their support, yet it is well settled, that they

ARBITRATION AND AWARD—*Continued.*

cannot be supported if the matters awarded are not within the terms of the submission.

- 4th. That the parties are not bound except by their agreement, and a decision by the arbitrators of any matter not referred to them, is beyond their authority, and vitiates the award, unless that part of it which is outside of the submission can be separated from the rest.
- 5th. That in this case it is impossible to make the separation, the sum awarded to G. and B. being *in solido*, and there being nothing on the face of the award to show what part of those sums consisted of damages awarded as before stated.
- 6th. That evidence was inadmissible to show in what manner the arbitrators reached their conclusion and the items making up the gross sums awarded.
- 7th. That the separability of the bad from the good must be apparent on the face of the award. *Ib.*

## ASSESSMENT.

*See* STOCKHOLDER, 1, 2, 3.

## ASSIGNMENT.

1. On the 6th of August, 1872, R. and S. made a lease to C. of land in Baltimore County, for the term of 99 years renewable forever. On the same day C. mortgaged the leasehold interest to the lessors to secure the repayment to them of a sum of money, agreed to be advanced to him by them, in specified instalments, upon certain dwelling houses which C. agreed to erect upon said lots. By the terms of the loan the money so to be advanced, was to be "*expended in the purchase of materials for and defraying the expenses of erecting said houses, and for no other purpose.*" Among other covenants in the mortgage C. covenanted, "to begin work forthwith and to complete the said houses, together with all necessary out-buildings, fencing and grading of the yards, and to have said houses ready for occupation of tenants in six months from the date hereof," &c. On the 10th September, 1872, C. delivered to O. the following order: "Messrs. R. and S. Will please pay to the order of O. six thousand dollars, in payment for bricks to be furnished by him in erecting the houses to be built on the lots of ground heretofore leased by the said R. and S. to C., out of the last payments that shall be due the said C. by the said R. and S., in accordance with the terms of the mortgage from C. to R. and S. upon said lots of ground. Signed, C. Baltimore City, September 10th, 1872." R. and S. wrote their acceptance upon this order on the day of its date, and four several payments by them were

ASSIGNMENT—*Continued.*

credited by endorsements thereon. The bricks were delivered as agreed upon by O., and C. commenced the buildings, but stopped work before they were entirely completed. In an action brought by O. against R. and S. to recover the balance due him upon said acceptance, O. testified that about the month of June, 1873, after C. had stopped work, one of the defendants said to him, "O. why don't you go to work and get those houses finished, I want to get the matter settled." Whereupon he went on to finish the houses, and did all that was required by the contract, as he thought. The defendants' first prayer which was conceded, affirmed that the order and the acceptance thereof by the defendants were conditional only, and the right of the plaintiff to recover depended precisely upon the same conditions, which the mortgage required to be performed by C. himself before he would become entitled to the money in question. **Held:**

- 1st. That this concession rendered the construction of the contract between the mortgagor and mortgagees a necessary preliminary to the decision of the case, if not the vital question.
- 2nd. That whether right or wrong the parties had agreed that this was the law of the case, which agreement *pro hac vice*, was alike binding on them and the Courts.
- 3rd. That the order and acceptance of it constituted an assignment by consent of mortgagor and mortgagees, or drawer and drawees, of so much of the fund on which it was drawn, to be paid on the performance of the conditions referred to—the terms relating to that subject; which were as to the mode and time of erecting the buildings.
- 4th. That the extension of the time by the defendants as given in evidence by the plaintiff, substituted the latter in the place of C., and entitled him to the benefit of the contract, as if the terms of the contract as to time originally, had been complied with.
- 5th. That the fund dedicated by the contract for the erection of the buildings, could not, in the hands of an assignee for valuable consideration, be encumbered with the collateral obligations of the assignor.
- 6th. That the plaintiff's obligation under the accepted order, required only the completion of the buildings "in accordance with the terms of the mortgage," by which the whole sum of money to be advanced, was to be expended in the purchase of materials for and defraying the expenses of erecting said houses, and for no other purpose.
- 7th. That the time for completing the work being waived, and the other prerequisites complied with, the plaintiff became entitled to

ASSIGNMENT—*Continued.*

his money without deduction or abatement for ground rent, interest, drainage, or other liabilities of his assignor for breach of other covenants in the mortgage. *Rosenstock, et al. vs. Ortwine*, 388.

2. A bill was filed for the sale of real estate for the purpose of partition. F. G. one of the defendants, by his answer denied all rights of the complainants in the land, and claimed exclusive right thereto by adverse possession. J. W. G. a younger brother of F. G. by his answer stated, that if he ever had any interest in the real estate mentioned, he was fully satisfied that it had been more than consumed and exhausted in his board, maintenance and education furnished by his brother F. G., and that he set up no claim of right to or interest in the land. Subsequently a decree was passed for the sale of the land for the purpose of partition among the parties. In the written opinion of the Court, in reference to which by express terms the decree was passed, it was declared that F. G. "should be allowed nothing for the support and maintenance of his brothers and sisters, he having been fully compensated by their labor, the fruits of which he enjoyed, for all trouble taken and expense incurred in their behalf." Upon the filing of the auditor's report distributing the proceeds of the sale made under this decree, J. B. without the formality of petition, appeared in the cause for the first time, and describing herself as assignee of the interest of J. W. G., excepted to the auditor's accounts, because the distributive share of J. W. G. was treated by the auditor as assigned to F. G. This exception was filed on the 7th of March, 1876. The only evidence of the assignment by J. W. G. to J. B., was a paper purporting to be executed on the 22nd of May, 1876, and the same day filed in the cause. There was no proof whatever of the execution of the paper, nor was it in any manner admitted or recognized by the parties to be affected by it, so as to justify the Court in receiving it as evidence. On appeal by J. B. from an order of the Court below overruling her exception, it was HELD :

- 1st. That the answer of J. W. G. did not operate as an equitable assignment of his interest to his brother F. G.
- 2nd. That the decree in directing the sale of the land for the purpose of partition among the parties to the cause, contemplated J. W. G. as one of the parties entitled to receive distribution of the proceeds of sale.
- 3rd. That reading the decree in connection with the opinion to which it refers, the idea of an assignment of J. W. G.'s interest to F. G. in consideration of support and schooling furnished, is entirely excluded.



ASSIGNMENT—*Continued.*

4th. That J. B. was not in a position to insist that the distribution to J. W. G. should be awarded to her as assignee, because she had not made herself properly a party to the proceedings, and had established no claim to the fund.

5th. That the assignment being filed in the cause at the time and in the manner it was, no exception was required to its admissibility in the Court below to exclude it from consideration in this Court, under the Code, Art. 5, sec. 26.

6th. That although J. B. had failed properly to present her claim under the assignment, (supposing it to be susceptible of proof,) and had furnished no complete proof upon the subject, yet there was enough in the record of which this Court could take notice, to justify it in remanding the cause, without reversing or affirming the order appealed from, for further proceedings under the Code, Art. 5, sec. 28.

7th. That the audit might however be at once ratified except as to the distribution claimed by J. B. as assignee. *Brown vs. Thomas, et al.*, 636.

*See* MORTGAGE, 1, 12.

SURETIES, 1.

## ASSIGNOR AND ASSIGNEE.

*See* ASSIGNMENT.

## ATTACHMENT.

1. In an action on a collector's bond, judgment was entered in 1866, for the penalty of the bond, "to be released on payment of the amount of the Comptroller's certificate, and subject to such insolvencies and removals as may be certified to the Treasurer by the County Commissioners." On the 12th of August, 1869, the certificate of the Comptroller was filed in the case showing the amount due the State with interest, and the judgment was extended for this sum. Afterwards the judgment was credited upon the Comptroller's certificate with certain sums for insolvencies, and afterwards, on the same authority, with a further sum for interest upon the judgment, which was "remitted or authorized to be done by law." This judgment was afterwards satisfied by the payment of the whole amount due thereon, by W. one of the sureties, and the administrators of S. another surety, who had died before the institution of the suit; and thereupon the judgment was entered to the use of W. for one-half the amount then due thereon, and to the use of the administrators of S. for the other half of said amount. Afterwards an attachment on the judgment was issued by W. and the administrators of S., and laid in the hand of

ATTACHMENT—*Continued.*

J. upon certain funds alleged to be held by him as county treasurer the same being the surplus proceeds of the sale of land, assessed to the principal debtor in the judgment for taxes due and unpaid by him.

On motion to quash the attachment, it was HELD:

- 1st. That the credits on the judgment could not now be urged against its validity.
- 2nd. That the defendants in the original suit having appeared by attorney, and no pleas having been filed, it must be assumed, that the judgment was entered by the consent of their attorney.
- 3rd. That inasmuch as S. had no judgment recovered against him, but had died before the suit was begun, his administrators were not entitled to an assignment of the judgment recovered against the principal and the other sureties, and to execution thereon, notwithstanding they may have satisfied the said judgment.
- 4th. That to entitle a surety to an assignment and execution against his co-sureties under sec. 7 of Art. 9 of the Code, it is incumbent upon him not only to satisfy the judgment, but to pay the *whole amount* of it.
- 5th. That if W. had satisfied the judgment in this case, that is *paid the balance* due upon it, he was entitled to an execution against his *principal*, but *not* against his *co-sureties*, for it appeared he did not pay the *whole* debt for which the judgment was rendered.
- 6th. That he could not, however, join with the administrators of S., even if they were entitled to an assignment and execution, as the assignment was not to them jointly, but one-half to each of them.
- 7th. That such joinder was therefore fatal to the attachment.
- 8th. That the surplus proceeds of the land of the attachment debtor, sold for non-payment of taxes, was not liable to attachment in the hands of the county treasurer. *Wilson, et al., Adm'rs vs. Ridgely, et al.*, 235.

## AUDITOR.

See ASSIGNMENT, 2.

## BALTIMORE CITY.

1. The law is well settled that where a new way or road is opened or made across a way or road already existing and in use, the new way must be so constructed as to cause as little injury as possible to the old way or road. *Northern Central Railway Co. vs. Mayor, &c. of Balto.*, 425.
2. Under proceedings by the street commissioners of the City of Baltimore, for condemning and opening North and Calvert streets, from  
42 v. 46.

BALTIMORE CITY—*Continued.*

John street to North avenue, the proof showed that the tracks of the Northern Central Railway Company at those points were laid, and their road was in use some time before the said proceedings were commenced, and that the whole of its land was necessary for the tracks of its road, and that the situation of said tracks with reference to said street was such, that the only mode in which the proposed streets could cross the tracks without great injury, both to the company and the city, was by viaducts or raised ways of some description. **Held:**

That said streets must cross the land and tracks of the railway company by viaducts or raised ways so as to allow its trains to pass below. *Id.*

3. In view of a proposed change in the route of said railroad within the city, an ordinance, (No. 77,) was passed September 26th, 1868, requiring the grades of certain named streets crossing the line of the new route of said railroad, to be raised *by the Mayor and City Council of Baltimore*, so as to enable the railroad company to construct its railway tracks under said streets, and providing that all open cuts along one of said named streets, "and other streets shall be tunnelled by the said railway company." **Held:**

- 1st. That in construing this ordinance, the location of the railroad at the time, and its consequent inconvenience to the public, and disadvantage to the neighboring property holders, as well as the then condition of the streets of the city, and the topography of the ground, over or through which the new railway tracks were to be constructed and the streets of the city had been located and opened, or located only on the city plat, must be kept in view.

- 2nd. That as North and Calvert streets, so far as the railway company's property was concerned then existed only on the city plat, the said company had the right to use its property as if no such streets were contemplated by the city authorities, and to lay its railway tracks upon it.

- 3rd. That said ordinance should not be held to impose upon the railway company the burden of constructing and maintaining viaducts for North and Calvert streets, over its land and railway tracks, unless such be its plain language; and that the language used could not be held to refer to those streets.

- 4th. That the ordinance not having changed the rights and liabilities of the parties in respect to North and Calvert streets, they remained as they were at common law, as if the ordinance had never been enacted; and the viaducts for said streets over

**BALTIMORE CITY—Continued.**

the land and railway tracks of the railway company, must be constructed and maintained by the city at its own cost and expense.

5th. That in the condemnation and opening of said streets, damages and benefits must be assessed to the railway company, with reference to the mode of crossing its land and tracks by viaducts or raised ways *Ib.*

**BANKS, NATIONAL.**

National banks, as Federal agencies, are only exempted from State legislation so far as it may impair their efficiency in performing the functions by which they are designed to serve the government of the United States. It is only when a State law incapacitates them from discharging these duties that it becomes unconstitutional. *Thomas, et al. vs. Farmers' Bank of Md*, 43.

**BEQUEST.**

*See* WILLS, 1.

**BILLS OF EXCHANGE AND PROMISSORY NOTES.**

*See* NEGOTIABLE INSTRUMENTS.

**BOND.**

1. An action was brought in March, 1874, by the State, for the use of K., on a trustee's bond to recover the balance of a sum of money arising from a trustee's sale made by F., and audited to K. then a minor. The sureties filed several pleas, on demurrer to one of which, it was HELD:

1st. That K. was under no legal obligation to inform the sureties that F. had become embarrassed, or that he had invested K's money, or that K. had declined to accept such investment.

2nd. That it was the duty of the sureties to make inquiries, and to see that their principal discharged the obligation resting upon him, whether he was then solvent or insolvent.

3rd. That when the auditor's account was ratified, F. as trustee became liable to pay on notice thereof and demand, and K. entitled to receive the sum of money audited to the latter.

4th. That until the money due K. was either paid to him, or invested according to his directions, F's sureties remained liable to K. on the bond. *Forrester, et al. vs. State, use of Kernan*, 154.

2. In an action on a sheriff's bond brought in the name of the State, for the use of the real claimant, it was HELD:

1st. That the State in such form of action permits its name to be used by the party beneficially interested, but is in no event answerable for any part of the costs.

BOND—*Continued.*

- 2nd. That the party for whose use the suit is instituted, is the plaintiff within the spirit and meaning of sections 8 and 10 of Art. 27 of the Code.
- 3rd. That if he is a non-resident of the State, there can be no doubt of the power of the Court to lay the rule requiring him to give security for the payment of the costs, as provided in sec. 10 of said Article. *State, use of Fullon vs. Layman, et al.*, 190.
3. J. S. was appointed secretary of an insurance company, and as such gave the company a bond with two sureties, conditioned that "if the above named J. S. shall faithfully perform his duties as secretary of the said P. F. Insurance Company of Baltimore, during the time he holds said office, and shall account for all the money which shall come into his hands as such secretary, then this obligation to be void, &c." By the 4th Art. of the by-laws of the company, after specifying certain duties to be performed by the secretary, he was required "in general to perform such other duties as may be referred to him by the board of directors or the standing committee." In an action on this bond brought by the company against the principal and sureties, to recover certain moneys of the company, which the secretary had received and misappropriated, it was HELD:
  - 1st. That the fact of the execution of the bond, and its remission to and retention by the company, until its production at the trial, was sufficient evidence of its acceptance and approval by the company, and the sureties were not entitled to express notice of its acceptance and approval.
  - 2nd. That under the 4th Article of the by-laws, the secretary might have been entrusted with the custody of the funds of the company, and a prayer limiting the responsibility of the sureties to any breach of the duties prescribed in said Article, and excluding the custody or safe-keeping of the funds of the plaintiff as one of those duties, was erroneous.
  - 3rd. That the bond upon a fair construction of its terms stipulated for the secretary's honesty and fidelity as an officer of the company.
  - 4th. That if the secretary was entrusted with the funds of the company, notwithstanding it was also the prescribed duty of the president to receive the money paid to the company and to deposit the same, and he was responsible for any failure of duty on his part, that did not relieve the secretary from responsibility for the faithful disposition of any funds confided to his care.

**BOND—Continued.**

- 5th. That the unauthorized act of the president in entrusting funds to the secretary, could not discharge the secretary from the faithful preservation thereof.
- 6th. That the stipulation of the bond was an undertaking for the fidelity and honesty of the secretary commensurate with the scope of his duties; and the enumeration in the 4th Art. of the by-laws of certain things to be performed by him, did not supersede this obligation which pervaded every department of his official functions.
- 7th. That the company had the right under this stipulation to insist upon indemnity for any deviation from the line of his duty to its prejudice.
- 8th. That in the absence of any provision to the contrary, such is the necessary import of the terms of the contract, and the sureties in executing the bond must be held as stipulating to this effect.  
*Engler vs. Peoples' Fire Ins. Co.*, 322.
4. Whilst it is an undoubted proposition, that the liability of the surety is not to be extended by implication beyond the terms of his written contract, by which his responsibility is to be measured, the bond constituting such contract must have such construction given to it as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other. *Id.*

*See* CONTRACT, 1.

GUARDIAN AND WARD, 2, 3.

MORTGAGE, 7-13.

PLEADINGS, 3.

SURETIES, 3, 5.

**BROKERS.**

1. Brokers do not usually possess the right of general lien, though, like other agents they may be in a situation to exercise the right of particular lien. *Barry, &c. vs. Boninger, &c.*, 59.
2. A cargo of sugar was imported by S., A. & Co. under letters of credit from the plaintiffs dated July 27th, 1875, and arrived in Baltimore under bills of lading in the name of the plaintiffs, in accordance with the agreement between the plaintiffs and S., A. & Co. as contained in the letter of credit. Upon the arrival of the vessel, S., A. & Co. gave a receipt to the plaintiffs for the sugar specified in the bill of lading, in which it was stated that they agreed to hold the sugar on storage as the property of the plaintiffs, with liberty to sell the same and account to them for the proceeds, until the amount of drafts drawn on S. & B. of London, in pursuance of the letter of credit, and accepted by them against the cargo of sugar, should be satisfac-

**BROKERS—Continued.**

torily provided for. The cargo was sold to McK., N. & Co. of Philadelphia, through the defendants as brokers, but before it was all delivered S., A. & Co. failed on the 26th of August. The defendants were then on the 27th of August, authorized to deliver the balance of the cargo and to draw for the proceeds. Upon the receipt of the money from the purchasers, the defendants retained out of it the amount due them by S., A. & Co. for brokerage in selling other cargoes imported by them and not belonging to the plaintiffs. In an action brought by the plaintiffs against the defendants to recover the amount so retained, it was **Held**:

- 1st. That the property in the sugar was in the plaintiffs under the letter of credit and S., A. & Co's trust receipt.
- 2nd. That the property in the sugar so being in the plaintiffs, the defendants had no lien upon it for, and could not retain out of it, the amount due by S., A. & Co. for brokerage effected for them.
- 3rd. That the only claim the defendants could legally assert against the cargo of sugar or its proceeds, was for the amount of brokerage due them for effecting a sale of that particular cargo. *Id.*

**BROKERAGE.**

*See* **BROKER**, 2.

**BUILDINGS.**

*See* **ASSIGNMENT**, 1.

**MECHANICS' LIEN**, 1.

**BURDEN OF PROOF.**

*See* **FRAUD**, 2.

**PARTNERSHIP**, 5.

**CAUSE, PROXIMATE OR DIRECT.**

*See* **INSURANCE**, 4.

**CERTAINTY.**

*See* **PLEADINGS**, 2.

**CLERK.**

*See* **RECORDS**, 4.

**CHARITABLE USES.**

*See* **WILLS**, 1.

**CHARTER.**

*See* **CORPORATIONS**, 3.

**CODE OF PUBLIC GENERAL LAWS.**

**ART. 5, SEC. 26.** Providing that on an appeal from a Court of equity, no objection to the competency of witnesses or the admissibility of evidence, or to the sufficiency of the

CODE OF PUBLIC GENERAL LAWS—*Continued.*

averments of the bill or petition, shall be made in the Court of Appeals, unless it appear by the record that such objection has been made by exceptions filed in the Court of equity, 636, 637, 641.

ART. 5, SEC. 28. Authorizing the Court of Appeals, it appearing or being shown that the substantial merits of a cause will not be determined by the reversing or affirming of any decree or order that may have been passed by a Court of equity, &c. &c., instead of passing a final decree or order, to order the cause to be remanded to the Court from whose decision the appeal was taken, for further proceedings, &c., 579, 636, 642.

ART. 8, SEC. 141. Declaring that "the citizens of the Village of Port Deposit, in Cecil County, are a body politic by the name of The President and Commissioners of the Village of Port Deposit, and as such may sue and be sued," &c., 500, 503.

ART. 9, SEC. 6. Providing that when a judgment shall be recovered against a principal and surety, and the judgment shall be satisfied by the surety, he shall have an assignment of the same and execution in his own name against his principal, 246.

ART. 9, SEC. 7. Providing that where there is a judgment against several sureties, and one of them shall satisfy the whole, he shall have an assignment and execution against his co-sureties for a proportionable part of the debt paid by the assignee, 236, 246.

ART. 26, SEC. 49. Substantially re-enacted by sec. 65 of the Act of 1868, ch. 471, which see.

ART. 27, SEC. 8. Providing that whenever any suit or action shall be marked for the use of any person, the person for whose use such suit or action is marked, shall be liable for costs as if he were the legal plaintiff, 190, 192.

ART. 27, SEC. 10. Giving the defendant the right where the plaintiff is a non-resident at the time the motion is made, to lay a rule security for costs upon the latter, and providing that on the plaintiffs failure to comply with said rule, by the second day of the next term of the Court, he shall be non-suited, 190, 192.



CODE OF PUBLIC GENERAL LAWS—*Continued.*

- ART. 35, SEC. 53. Giving to the Judges of the several Circuit Courts, each in his respective Circuit, and the Superior Court of Baltimore City, in the City of Baltimore, jurisdiction of all cases of contested elections of any of the officers not provided for in the Constitution, or in the preceding section, (Comptroller and Commissioner of the Land Office,) 123, 129.
- ART. 35, SEC. 54. Giving to each Judge of the said Circuit Courts, and of the Superior Court of Baltimore City, authority to adopt such mode of proceeding in cases of contested elections, and to prescribe such rules for taking testimony and adjudging costs, as to him shall seem most satisfactory and least expensive, 123, 129.
- ART. 51, SEC. 14. Providing that "no justice of the peace shall have jurisdiction in actions where the title to land is involved," &c., 183.
- ART. 51, SEC. 33. Providing that if the defendant, in an action before a justice of the peace for cutting, destroying or carrying away timber or wood to or from any land in this State, or for doing any other injury to such lands, shall allege in writing that he claims title to said lands, or that he acted under a person claiming title to the same, whom he shall name in such allegation, and shall verify said allegation by oath, the justice shall take no further cognizance of the case, 181, 184.
- ART. 61, SEC. 1. Providing that every building erected and every building repaired, rebuilt or improved to the extent of one-fourth its value, shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the same, 464.
- ART. 61, SEC. 3. Providing "that no person having such lien shall be considered as waiving the same by granting such credit, or receiving notes or other securities, unless the same be received as payment or the lien be expressly waived, but the sole effect thereof shall be to prevent the institution of any proceedings to enforce said lien until the expiration of the time agreed on," 467.

CODE OF PUBLIC GENERAL LAWS—*Continued.*

- ART. 61, SEC. 11. Providing that if the contract for furnishing such work or materials, or both, shall have been made with any architect or builder, or any other person except the owner or owners of the lot on which the building may be erected, or his or their agent, the person or persons so doing work or furnishing materials, or both, shall not be entitled to a lien unless, within sixty days after furnishing the same, he or they, or his or their agents, shall give notice in writing to such owner or owners, or agents, if resident within the city or county, of his intention to claim such lien, 465.
- ART. 61, SEC. 41. Enacting that "Article 61 shall be construed, and have the same effect, as laws which give general jurisdiction or are remedial in their nature," 464.
- ART. 81, SEC. 82. Providing that in an action upon a collector's bond, in reply to a plea of performance, the State may reply, that the obligor or obligors hath or have not performed the condition of his or their bond, and give the special matter in evidence, and that it shall not be necessary to set out the breaches, 244.
- ART. 93, SEC. 5. Providing for the disbursements that shall be allowed an executor or administrator in his administration account, 551, 553.

CODE—CONSTRUCTION OF.

- See* ASSIGNMENT, 2.
- EXECUTION, 1.
- JUSTICE OF THE PEACE, 1.
- MECHANICS' LIEN, 1.
- ORPHANS' COURT, 1.
- PRACTICE, 2.
- STOCKHOLDER, 2.

CODE OF PUBLIC LOCAL LAWS, CONSTRUCTION OF.

- See* CORPORATIONS, 9, 10.

COLLATERAL PROCEEDING.

- See* CORPORATIONS, 5.

COLLECTOR.

- See* ATTACHMENT, 1.

COMMISSIONS.

- See* ORPHANS' COURT, 1, 9.

## CONDITION.

*See* BOND, 3.

STOCKHOLDER, 4.

## CONSIDERATION.

*See* SURETIES, 7.

## CONSTITUTIONAL LAW.

1. The Act of 1860, ch. 265, incorporating The Consolidation Coal Company, by its 6th section, conferred on said company the right to construct, locate and maintain such railroad or railroads as the Directors thereof might deem necessary for the convenient transaction of its business, and invested it with all the rights of *eminent domain* in the survey, location and construction of such railroads, which had been conferred upon the Baltimore and Ohio Railroad Company, by its Act of incorporation, 1826, ch. 123, or by any supplement thereto. Upon a proceeding by the State of Maryland to procure a forfeiture of the charter of said Consolidation Coal Company. **Held:**

1st. That the Act of 1860, ch. 265, must be interpreted in connection with and in subordination to the provision contained in the Constitution of 1850, Art. 3, sec. 46, and also, in the Constitutions of 1864 and 1867, which declared that the Legislature should enact no law authorizing private property to be taken for public use, without just compensation being first paid or tendered; and the charter of the Baltimore and Ohio Railroad Company to which it refers, must in this respect be construed as consistent with the Constitution, its words being clearly susceptible of such construction.

2nd. That if it were otherwise the particular provision would simply be inoperative, in so far as it might be inconsistent with the Constitution, but would not render the whole Act void.

*State vs. Consolidation Coal Company*, 1.

2. In the original charter of the Cumberland and Pennsylvania Railroad Company, the Legislature expressly reserved the power to alter, repeal or annul the charter at pleasure. By the Act of 1876, ch. 64, modified by the Act of 1876, ch. 80, the rates of toll authorized to be charged by said company were reduced. **Held:**

That the Act of 1876, ch. 64, was a constitutional and valid law, and that the railroad company could not lawfully exact or receive higher rates for transportation than that Act provides. And that the Act of 1876, ch. 80, was also free from constitutional objections. *American Coal Co. vs. Consolidation Coal Co., et al.*, 15.

3. The Farmers' Bank of Maryland recovered judgment in 1864, against T. and others. The Act of 1865, ch. 144, authorized the State bank-

CONSTITUTIONAL LAW—*Continued.*

ing institutions to become banking associations under the laws of the United States, and provided for the surrender and extinction of their State charter, with a *proviso*, "that said bank, etc. may continue to use its corporate name for the purpose of protecting and defending suits instituted by or against it, and of enabling it to close its affairs, but not for the purpose of continuing under the laws of this State its business," etc. In pursuance of this Act and of the Act of Congress of June 3rd, 1864, which provides that the national banks, organized thereunder shall have a corporate name by which they shall sue, etc., the Farmers' Bank of Md., in June, 1865, was converted into the Farmers' National Bank of Annapolis, and in May, 1874, under its original corporate name, it sued out a *scire facias* on the above judgment against the original defendants and certain terre-tenants. **Held:**

- 1st. That the Act of 1865, ch. 144, simply confers a privilege and is not in conflict with the Act of Congress.
- 2nd. That the *scire facias* could issue in the name of the Farmers' Bank of Maryland.
- 3rd. That the Farmers' National Bank of Annapolis is the substantial plaintiff, and in case of judgment for defendants would be liable for costs. *Thomas, et al. vs. Farmers' Bank of Md.*, 43.
4. It is altogether beyond the scope of legislative power in Maryland to authorize a variation or departure from the terms of a trust. *Provost, &c. of Dumfries vs. Abercrombie, et al.*, 172.
5. The entire subject of the Act of 1874, ch. 221, relating to the measuring of oysters sold in the shell, is in strict conformity with its title, and not in contravention of the Constitution, Art. 3, sec. 29, which provides that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." *McGrath vs. State*, 631.
6. The object of the Act was to prevent fraud on the *buyer by short measure*, and to prevent fraud on the *seller by over measure*, and is neither a special law within the meaning of the Constitution, Art. 4, sec. 33, which provides that "the General Assembly shall pass no special law for any case for which provision has been made by an existing general law," nor was there at the time it was passed, a general law on the subject. *Ib.*
7. Under an indictment for disposing of oysters by heaping measure, and not by even and struck measure, the evidence showed that the oysters were taken from a vessel, measured in tubs by heaping measure and thence taken to the packing house of F. & Co. **Held:**

CONSTITUTIONAL LAW—*Continued*

That in the absence of proof to the contrary it was but fair to presume that the oysters were sold to F. & Co. *Ib.*

8. Evidence was offered to prove that from the nature of oysters in the shell, as brought from the bed, it was impossible to measure them by even or struck measure. **HELD :**

That this evidence was irrelevant unless accompanied by an offer to prove, that bunch oysters could not be separated for the purpose of measurement as required by the Act. *Ib.*

9. The Act of 1874, ch. 221, requires oysters in the shell to be measured at certain designated places, in an iron tub of certain dimensions, and that the measure shall be even or struck measure. It further provides, any one violating the provisions of the Act shall be guilty of a misdemeanor, &c. **HELD :**

That the measuring of oysters in the shell by *heaping measure* is a violation of the provisions of this Act. *Ib.*

*See* COURTS, 1.

ELECTIONS, 1.

## CONTINGENT REMAINDERS.

*See* WILLS, 3.

## CONTRACT.

1. Twelve persons entered into the following obligation under seal :

“Whereas, P. S. is employed by the Baltimore County Brewing, Malting and Distilling Company, as the manager of said Company; and whereas, the said P. S. is employed and authorized to purchase the malt and hops for said brewery; and whereas, each of the directors of said company have agreed to become individually responsible in the sum of twenty-five hundred dollars each, for malt and hops, which the said manager shall purchase for the use of the said brewery, during the space of one year from the date hereof. Now therefore, these presents witness, that in consideration that said P. S. will undertake said authority and employment, and that dealers in hops and malt will sell to him upon the faith of this bond, we bind ourselves and each of us, our, and each of our heirs, executors and administrators, in the sum of twenty-five hundred dollars each, making in all the sum of thirty thousand dollars, for the payment of hops and malt, which the said P. S. may purchase for the use of said brewery, during the space of one year from the date thereof: and we, and each of us agree and promise, that we will pay such hops and malt bills, in total not exceeding the sum of thirty thousand dollars, or twenty-five hundred dollars each, in the manner and at the time the said P. S. shall agree to pay them.”

CONTRACT—*Continued.*

In an action against all of said obligors jointly, it was **Held** :

- 1st. That in the construction of said paper, as in the construction of all written instruments, the cardinal rule to be observed, was to ascertain the intention of the parties as expressed on the face of the paper.
- 2nd. That the said instrument construed all together and in all its parts, was a contract by which each of the obligors had bound himself severally for \$2500 only. *Boyd, et al. vs. Kienle, et al.*, 294.
2. If a question arises whether a covenant be joint or several with respect to the covenantees, that is to say, whether parties claiming the benefit of the covenant must sue thereon jointly or may sue severally, regard must be had to the interests of the covenantees in the covenant. *Ib.*
3. But this rule has no application to the construction of a covenant, with respect to the obligation of the covenantors, in determining whether they are bound jointly, or jointly and severally, or severally only, and the extent of the obligation. *Ib.*
4. In the above action on appeal it was **Held** :  
That the obligation was several and not joint, and that the action could not be sustained. *Ib.*

*See* ASSIGNMENT, 1.

## CONTRIBUTION.

*See* SURETIES, 16.

## CORPORATIONS.

1. The Cumberland and Pennsylvania Railroad Company was chartered by the Act of 1849, ch. 469. It was authorized to construct a railroad from Cumberland to some suitable point on the dividing line, between the States of Maryland and Pennsylvania, and to make lateral roads in any direction branching from its main line. By *sec. 21*, full right and privilege was reserved to citizens and corporations of the State to connect with said railroad, and by *sec. 22*, the Legislature reserved to itself the right to alter, repeal or annul this Act at pleasure. By its charter it was authorized to charge at specified rates for freight and passengers. By the Act of 1868, ch. 334, these rates were reduced. This amendment to the charter was accepted by the company, and it continued its business operations in accordance therewith till the spring of 1876, when the Legislature then in session, by the Act of 1876, ch. 64, amended the charter by a further reduction of the rates of charge. This Act was approved by the Governor on the

CORPORATIONS—*Continued.*

14th of March, 1876; while it was pending, a deed of the company dated March 2nd, 1876, was executed, conveying to the Consolidation Coal Company its railroad and all its property of every description, with its privileges and franchises; and the latter company having taken charge and possession of the said railroad and property under the deed, continued to conduct the same as its own, claiming the right to charge for transportation thereon the rates allowed by its own charter, which were in excess of the rates allowed by the Act of 1876, ch. 64; and exacted and received rates greater than those allowed by that Act. On a proceeding by the State to procure a forfeiture of the charter of the Consolidation Coal Company; **Held:**

1st. That the Cumberland and Pennsylvania Railroad Company was not authorized to execute said deed of the 2nd of March, 1876, without the consent of the Legislature.

2nd. That such consent was not contained in the charter of the Consolidation Coal Company, (1860, ch. 265,) by which the latter company was authorized "*to purchase, lease, hold and maintain any other railroad or railroads, or other roads or ways, water-courses or channels of transportation, already constructed or hereafter to be constructed, with all the rights, powers and franchises connected therewith.*"

3rd. That the said Act was not designed, nor can it be properly construed to be an amendment of the charter granted to the Cumberland and Pennsylvania Railroad Company, which alone must be looked at in order to ascertain what are the powers of the latter company.

4th. That the power to sell and convey all its property and franchises, and thus escape from its duties and obligations to the public, could only be conferred by the Legislature upon the Cumberland and Pennsylvania Railroad Company, and could not arise by implication from the provisions contained in the charter of the Consolidation Coal Company, which have reference only to the powers of the latter, and do not profess to confer any new powers upon other companies.

5th. That the deed of March 2nd, 1876, was inoperative and void, and passed no title to the grantee in the franchises, railroad and other property of the Cumberland and Pennsylvania Railroad Company, and the latter company continued to hold the same, notwithstanding the deed, and remained subject to the power of the Legislature to alter or amend its charter.

CORPORATIONS—*Continued.*

- 6th. That the Act of 1876, ch. 242, sec. 14, regulating the rates of transportation on railroads, has no application to the railroad of the Cumberland and Pennsylvania Railroad Company.
- 7th. That the Cumberland and Pennsylvania Railroad Company was still a subsisting corporation, vested with rights, franchises and property granted by and acquired under its charter, and subject to the power of the Legislature to regulate the rates to be charged for transportation upon its road.
- 8th. That this power was exercised by the Act of 1876, ch. 64, and assuming that Act to be free from constitutional objection, it would follow that no rates in excess of those allowed by that Act could lawfully be charged for transportation on its road.
- 9th. That the alleged excessive rates exacted by the Consolidation Coal Company, while in charge of and carrying on the road, claiming to be owner under the deed, could not be construed as a violation of the charter of the latter, and therefore they furnished no sufficient cause for the forfeiture thereof. *State vs. Consolidation Coal Company*, 1.
2. Where in the original charter of a Railroad Company the Legislature expressly reserved the power to alter, repeal or annul the charter at pleasure, the question, whether a proposed amendment of the charter is wise or consistent with the public interests and with the prosperity of the company, is one which by the charter is made to depend upon the wisdom and discretion of the Legislature, and is not a question to be determined by the Courts. This construction of the terms of the charter is part of the contract, and all parties dealing with the company, acquire and hold their rights, subject to the reserved power of the Legislature to alter, repeal or annul the charter at its pleasure. And the Court cannot presume that the power will be exercised by the Legislature arbitrarily or unjustly. *American Coal Co. vs. Consolidation Coal Co., et al.*, 15.
3. The Western Telegraph Company was incorporated by a special Act of Assembly, 1846, ch. 39, for a period of thirty years, and the Legislature reserved to itself the right to alter and amend the charter at pleasure. Shortly before the expiration of this charter, steps were taken by a majority of the stockholders to re-organize under the General Corporation Act of 1868, ch. 471. On a bill filed by a stockholder for an injunction to restrain this re-organization, it was HELD:
- 1st. That there was nothing in the Act of 1846, to prevent a majority of the stockholders from organizing under the Act of 1868.



CORPORATIONS—*Continued.*

- 2nd. That the reservation by the Legislature of the power to alter and amend its charter at pleasure, became part of the contract between the State and the corporators, and the exercise of it in no manner impaired the obligation of a contract within the meaning of the Constitution of the United States.
  - 3rd. That the amended or substituted charter may be conferred by a special Act, or by a general law authorizing the corporation to organize under such general law; and if such amended or substituted charter is accepted by a majority of the stockholders, such acceptance is binding upon all the members of the corporation, unless the original purpose of the corporation be changed by such charter.
  - 4th. That the alteration of the charter may be as lawfully made by the substitution of a new charter as by the amendment of the old, provided such substituted charter be germane, and necessary to the objects and purposes for which the company was organized.
  - 5th. That the proposed organization under the Act of 1868, is not liable to the objection, that it will effect a radical and fundamental change, in the objects and purposes for which the original company was chartered.
  - 6th. That the mere grant of additional powers auxiliary to the original design does not constitute such radical and fundamental change. *Sprigg vs. Western Telegraph Co., et al.*, 67.
  4. The Courts are bound to regard a company incorporated according to all the required forms of law, as a corporation so far as third parties are concerned, until it is dissolved by a judicial proceeding in behalf of the government that created it. *Jaffin and Rand Powder Co. vs. Sinshimer, et al.*, 315.
  5. The plaintiff sued certain members of a corporation to make them liable individually for goods sold and delivered to the corporation, upon the ground that said individuals had not been duly incorporated by reason of non-compliance with statutory requirements. Proof was offered by the plaintiff tending to show that certain requirements, which the plaintiff claimed to be conditions precedent to the incorporation of the defendants, had not been complied with. The certificate of incorporation disclosed no error upon its face, and was authenticated in such manner as was declared by the statute under which it was made, should be sufficient evidence of the existence of the corporation.
- HELD :

CORPORATIONS—*Continued.*

- 1st. That the plaintiff stood in this case in the attitude of a third person to the corporation, and could not by proof *aliunde* the certificate impeach its corporate existence.
  - 2nd. That the company was a corporation *de facto* at the time the goods were sold and delivered to it by the plaintiff, and its existence as a corporation could not be drawn collaterally in question.
  - 3rd. That the exhibition of its incorporation duly and properly authenticated, was a sufficient answer to the claim preferred against the defendant. *Ib.*
6. The Act of 1868, ch. 471, in its 14th section provides among other things for the incorporation of religious societies, and by secs. 156, 162, 163 and 164, for religious corporations. **Held:**
- That these last provisions are more especially applicable to the organization of a church, religious society, or congregation of whatever denomination, and it is to be presumed were intended for such purpose. *Boyce vs. Trustees, &c. of the M. E. Church*, 359.
7. Amongst other requisites to constitute a religious corporation, church, religious society or congregation under these last sections, it is provided that the agreement for that purpose should be acknowledged by the trustees or a majority of them, before two justices of the peace of the county or city in which the church, congregation, or society, or the greatest number of the members shall reside, or before a Judge of the Circuit Court, or of the Supreme Bench of Baltimore City, and certified by the said Justices or Judge according to the directions of section 163. **Held:**
- That no authority having been given to the Judge by these provisions to determine that the provisions of law have been complied with, his certificate is no sufficient evidence of that fact. *Ib.*
8. In a suit against a religious corporation, where the certificate of incorporation was defective and insufficient to show that the defendant was a corporation. **Held:**
- 1st. That the fact that it held itself out as a corporation, and treated with the plaintiff as such, did not estop it from denying its liability as a corporation.
  - 2nd. That the statute law of the State having expressly required certain prescribed acts to be done to constitute a corporation, the omission of those requisites cannot be supplied by the application of the doctrine of estoppel. *Ib.*

CORPORATIONS—*Continued.*

9. By sec. 141 of the Code of Public Local Laws, Art. 8, it is declared, that "the Citizens of the Village of Port Deposit in Cecil County, are a body politic by the name of The President and Commissioners of the Village of Port Deposit, and as such may sue and be sued," &c.; then follow a number of sections defining the powers and duties of said municipal corporation. By the Act of 1872, ch. 347, these sections are *amended* and *re-enacted*, and by said amendment, it is provided that "the inhabitants of the Town of Port Deposit in Cecil County, are a Corporation by the name of President and Commissioners of Port Deposit, and by that name shall have perpetual succession, sue and be sued," &c. This Act contained no clause *expressly repealing* the sections of the Code above referred to. **Held:**

That the Act of 1872, effected no change in the corporate existence of the municipality, and that a judgment rendered in December, 1874, in a suit instituted against it prior to said Act by its old name, was a valid judgment. *Watts vs. President, &c. of Port Deposit*, 500.

10. The Act of 1872, after conferring powers upon the said corporation to carry out which would render taxation necessary provides, that the President and Commissioners "shall have power to levy and collect taxes in said town, not exceeding in any one year thirty cents in the one hundred dollars on the assessable property of said town." The Act of 1876, ch. 367, provides that "any municipal corporation in this State against which there is a judgment in any Court of law in this State, shall have power to levy a sum of money upon the assessable property of such municipality sufficient to pay such judgments." **Held:**

1st. That the said Act of 1876, applies to the corporation and judgment above mentioned.

2nd. That the power given by the original charter and by the Act of 1872, to levy a tax not exceeding thirty cents in the hundred dollars, was a power of taxation for the general purposes intended to be provided for by those laws, and was not inconsistent with a special authority conferred by the subsequent Act to levy more when required for a particular occasion. *Id.*

*See BALTIMORE CITY.*

## COURTS.

1. Under the Constitution, Art. 4, secs. 26 to 37, relating to the Courts of Baltimore City, the several Courts therein provided for, that is to say, the Superior Court, Court of Common Pleas, City Court, Circuit

COURTS—*Continued.*

Court and Criminal Court, are distinct and separate bodies, neither having any authority or control over the clerks, the dockets or records of the others. *Goldsmith vs. Kilbourn, Ex'z*, 289.

2. The proper mode of proving the proceedings and judgments of one of these Courts in any other Court, is by the production of a transcript thereof under seal duly certified. *Ib.*
3. The original dockets, or a mere copy of the docket entries, or the original papers, are not proper or admissible evidence for that purpose. *Ib.*
4. For the like reason the evidence of the deputy clerk of one of said Courts as to the loss of the papers in a case in said Court, is inadmissible in any other Court. *Ib.*

See ELECTIONS, 1.

## COURT—PROVINCE OF.

See NOTICE, 1.

## COVENANT.

1. G. as trustee for C., and R. in his own right, were the owners in fee of adjacent lands in Baltimore County. R. having certain limestone quarries on his land, by lease made between G. of the first part, C. of the second part, and himself of the third part, leased from G and C. certain quarry rights on their land for the period of 15 years, including certain water works, &c., on the lands of the lessors. There was a clause in the lease by which the lessors granted to R., his heirs and assigns, owners of the adjoining tract of land, the *perpetual* right and privilege, after the determination of said lease, to use one-fourth of the water power produced by means of said water works, for the sole purpose of pumping out water from the quarries then or thereafter to be opened on R's land, the trustee reserving the other three-fourths of said water power for such use as he, his heirs, successors or assigns might deem proper for the purposes of the trust. And it was thereby expressly agreed, "that after the expiration of the exclusive right to use the whole of said water power hereinbefore granted, and demised for fifteen years aforesaid, whether by effluxion of time, surrender or otherwise, that the expenses of keeping and maintaining said water power fit for use; and of cleaning out the race and repairing the dam, trestle work, tail-race, water wheel, mill house, &c., shall be borne by the party of the first part hereto, his heirs, successors and assigns, and by the party of the third part his heirs and assigns, owners of the said lands, marked on said plats as William

COVENANT—*Continued.*

Robinson's land, in the proportion of three-fourths to the party of the first part, and one-fourth to the party of the third part." The term of the lease having expired, and the water works having been abandoned, and permitted to fall into decay with the consent of all parties, the trustee and *cestui que trust* sued the assignee of R's land in covenant to recover *one-fourth part of the estimated costs of repairs.*

## HELD:

- 1st. That the stipulation in the lease in regard to the proportion of expense to be borne by the respective parties, could not be construed as an *express agreement on the part of R. to make the repairs.*
  - 2nd. That there was nothing on the face of the lease from which such agreement could be implied. *Merryman, Trustee, et al. vs. Shipley, 79.*
2. The Peabody Heights Company of Baltimore City, sub-leased certain parcels of ground to A. J. G., who afterwards assigned his interest to J. B. The deeds of sub-lease contained a covenant for renewal in these terms: "and also, that at any time during the continuance of this demise, the Peabody Heights Company of Baltimore City aforesaid, or its assigns, shall, and will, on payment to it or them of ten dollars as a fine therefor, execute and deliver, or cause and procure to be executed and delivered to the said A. J. G., his executors, administrators or assigns, at his or their request and cost, a new sub-lease of the above described parcels of ground and premises, or either of them, reserving to the said lessor a reversion of one day therein, which new sub-lease shall be subject to the same rents and contain the like covenants as are herein contained; and in particular a covenant for perpetual renewments, *so that this lease,* and the estates created thereby, and each and every of them shall be renewable, and renewed from time to time forever." **HELD:**
- 1st. That like all other contracts the real intention of the parties to this covenant must control its interpretation.
  - 2nd. That the purpose of the covenant was to preserve the lease for its original term, and the estates which it created, and to continue them forever.
  - 3rd. That to accomplish this and carry out the intention of the parties, a new lease if required under this covenant, should be made to commence and take effect from the expiration of the original term.
  - 4th. That the insertion of words in the covenant stating expressly when the new term should commence, was not necessary, if by other terms and provisions, and the character of the whole instrument the same intention was made to appear.

**COVENANT—Continued.**

5th. That such intention was manifest upon the face of the said conveyance. *Boyle vs. Peabody Heights Co. of Balto. City*, 623.

3. On a bill filed by J. B. against the sub-lessor, claiming a renewal of said sub-leases to take effect at once, it was alleged that there were certain inaccuracies in the description of two of the lots, which the complainant was entitled to have corrected, it was **Held** :

That J. B. was not entitled to relief upon this ground without making the sub-lessee a party to the bill, and requiring him to be united in the new lease. *Ib.*

*See* **CONTRACT**, 1, 2.

**INSURANCE**, 1, 5.

**LEASE**, 1.

**CREDIT.**

*See* **AGREEMENT**, 2.

**CREDITOR.**

*See* **SHERIFF**, 1, 2.

**CRIMINAL LAW.**

*See* **APPEAL**, 3-8.

**DAMAGES.**

*See* **ARBITRATION, &C.**, 2.

**DEATH.**

*See* **INSURANCE**, 4.

**DEBTS.**

*See* **HUSBAND AND WIFE**, 1, 2.

**DECLARATIONS.**

*See* **ADVANCEMENT**, 5.

**EVIDENCE**, 1.

**INSURANCE**, 3.

**DECREE.**

*See* **ASSIGNMENT**, 2.

**DECREE IN REM AND IN PERSONAM.**

*See* **MECHANICS' LIEN**, 3.

**DEDICATION.**

*See* **JURY**, 1.

**NUISANCE**, 4.

**DEED.**

*See* **ADVANCEMENT**, 4, 5.

## DEED POLI.

See INSURANCE, 2.

## DELIVERY.

See BOND, 3.

SURETIES, 8.

## DEMURRER.

Goes back to the first error in pleading. *Shertzer vs. Mut. Fire Ins. Co. of Harford Co*, 506.

## DEVASTAVIT.

See EXECUTORS, 1.

## DISTRIBUTION.

See WILLS, 2.

## ELECTIONS.

1. The Constitution of 1867, continued in force all Acts of Assembly, not inconsistent with the provisions of that instrument. At the time of the adoption of the Constitution, the following sections of Art. 35 of the Code, were in force. "Sec. 53.—All cases of contested election of any of the officers not provided for in the Constitution, or in the preceding section, shall be decided by the Judges of the several Circuit Courts, each in his respective Circuit, and by the Superior Court of Baltimore City, in Baltimore City. Sec. 54.—Each Judge of the Circuit Court, and of the Superior Court of Baltimore City, may adopt such mode of proceeding in cases of contested elections, and prescribe such rules for taking testimony, and adjudging costs as to him shall seem most satisfactory and least expensive." On a case of contested mayoralty election in the Superior Court of Baltimore under the foregoing sections of the Code, HELD:

That the jurisdiction of the Superior Court of Baltimore City, in cases of this kind, is a special and exclusive jurisdiction, and there being no provision by the law for the right of appeal, its judgment in the premises is final and conclusive. *Warfield vs. Latrobe*, 123.

## EMPLOYÉ.

See MASTER AND SERVANT, 1, 2.

## ENTRIES.

See RECORDS, 3.

## EQUITY.

1. As to case where in a proceeding in equity against the sureties for a devastavit committed by an executor, it was held, that equity had no jurisdiction, the obligation of a surety of an executor being one

EQUITY—*Continued.*

of contract, the complainant had a plain, adequate and complete remedy at law by action on the bond. *Edes, et al. vs. Garey and Lanahan*, 24.

2. A Court of equity will not restrain the execution of a judgment, unless it shall appear, that the complainant had a valid defence of which he could not have availed himself at law, or of which he might have availed himself, but was prevented by mistake, surprise or fraud unmixed with any fault or negligence of his own. *Hill vs. Reifsnider, et al.*, 555.

See EXECUTORS, 3.

HUSBAND AND WIFE, 1, 2.

INJUNCTION.

MECHANICS' LIEN, 2.

EQUITY OF REDEMPTION.

See MORTGAGE, 4, 5, 6.

ESTATE, SEPARATE.

See HUSBAND AND WIFE, 1, 2.

ESTOPPEL.

1. In a suit against a religious corporation, where the certificate of incorporation was defective and insufficient to show that the defendant was a corporation. HELD:

1st. That the fact that it held itself out as a corporation, and treated with the plaintiff as such, did not estop it from denying its liability as a corporation

2nd. That the statute law of the State having expressly required certain prescribed acts to be done to constitute a corporation, the omission of those requisites cannot be supplied by the application of the doctrine of estoppel. *Boyce vs. Trustees, &c. of the M. E. Church*, 359.

See EXECUTORS, 3.

GUARDIAN AND WARD, 1.

INSURANCE, 3.

MORTGAGE, 6.

NEGOTIABLE INSTRUMENTS, 2.

EVIDENCE.

1. An action was brought in March, 1874, by the State, for the use of K., on a trustee's bond to recover the balance of a sum of money arising from a trustee's sale made by F., and audited to K. then a minor. Evidence was offered by the defendants in said action, consisting of declarations of S., not a party to the suit, without any evidence



EVIDENCE—*Continued.*

having been previously introduced, and without any offer to follow it up with evidence to show that he was K's attorney, or agent, or in any manner authorized by him to make such statements or declarations. **HELD:**

That the statements thus sought to be introduced, consisted of hearsay simply, and were properly excluded from the jury. *Forrester, et al. vs. State, use of Kernan, 154*

2. Where the record fails to show that evidence was admitted subject to exception, and it does not appear that the Court below passed upon a motion made to exclude the same, and there is no exception in the record with respect to the matter, it must be presumed by this Court that the evidence was admitted without objection. *Id.*
3. In an action by a bricklayer to recover a balance due him for laying the bricks in certain houses of the defendant, the plaintiff offered to prove by a measurer, that he had measured the buildings in question by a rule adopted by the trade in the City of Baltimore, which had been tested and found correct, and that by the measurement so made the buildings contained a certain number of bricks. Upon objection to this evidence, upon the ground that as it was shown that the bricks were of unequal size, a correct estimate of the number in the houses could not be ascertained by said rule of measurement, it was **HELD:**
  - 1st. That the evidence was admissible, but it was the province of the jury alone to give such effect to it as they might think it entitled to.
  - 2nd. That in the said action to recover for laying a certain number of bricks, evidence by the defendant that he had only paid the brickmaker for a lesser number, was irrelevant to the issue and inadmissible. *Donohue vs. Shedrick, 226.*
4. The defendant having given evidence of the measurement of single bricks and single square feet, tending to show that the rule stated by the plaintiffs' measurer was incorrect, and that the salmon brick in the defendant's houses occupying the partition and inside walls above the first floor joists, held a proportion of two-thirds of the whole number, and that by the correct rule there were thirteen bricks and a fraction to the square foot, in a nine inch wall, the plaintiff offered proof by measurers and a bricklayer acquainted with the trade, and with the modes and rules of measurements, that they had measured single bricks of the largest size in the buildings in question, and also in several places in the walls where the bricks were largest

## EVIDENCE—Continued.

had measured square feet, and then offered to prove how many bricks by their measurement and calculation were in a square foot of the walls. On objection, it was **HELD**:

That this evidence was clearly admissible in rebuttal of the proof introduced by the defendant as to the measurement of single bricks and square feet in the walls. *Ib.*

5. A letter which is *per se*, and without further proof, inadmissible in evidence, may become admissible, when it is followed up by further proof, as purporting to give notice of the fact stated therein, and its admission will not be ground for reversal, particularly when no injury was done to the appellant thereby. *Roberts, et al. vs. Woven Wire Mattress Co.*, 374.
6. In an action against a surety, the record of a judgment against his principal, unless shown to be on account of matters connected with his guaranty, is inadmissible. But where the record shows a liability embraced by the guaranty of the surety, it is *prima facie* evidence for that purpose. *Ib.*
7. On the 26th of April, 1870, R. wrote a letter to the M. Co. stating his intention to take the agency of the Co., and that his brother would be offered as surety for the performance of his obligations. On the 12th of May, 1870, a contract of agency between R. and the Co. was perfected, and on the 21st of May, 1870, a bond of indemnity was executed by his brother as guarantor. In a suit by the Co. against the guarantor on the bond, it was **HELD**:

That as a preliminary step towards a final arrangement, if made out to the satisfaction of the jury, between R., the Co., and the guarantor, the letter was a constituent part of the transaction, and was admissible in evidence. *Ib.*

8. Where letters were read to the jury by one party to a cause without objection or statement of the purpose; after the limitation of their effect upon the objection of the other party, it is not the province of the Court, *sua sponte*, to undertake to define any other purpose for which they might be used. *Ib.*

See ARBITRATION, &c., 2.

CONSTITUTIONAL LAW, 7, 8.

CORPORATIONS, 5, 7.

EXCEPTIONS, 2, 3.

INSURANCE, 2, 3.

MALICIOUS PROSECUTION, 1, 2, 3.

MASTER AND SERVANT, 3.

EVIDENCE—*Continued.*

NEGOTIABLE INSTRUMENTS, 2.

PRACTICE, 1.

RECORDS, 2, 3, 4.

## EXCEPTIONS.

1. The refusal of a Court to sign and seal a bill of exceptions, or to incorporate therein certain evidence, cannot be reviewed by this Court upon a bill of exceptions taken to such refusal, unless the refusal of the Court below is based upon its opinion, that such evidence is irrelevant. *Carey & McColgan vs. Merryman, Bro. & Co.*, 89.
2. Where an exception states that it was taken to the admissibility of certain evidence offered in the case, although it does not state what action was taken by the Court below upon the exception, it may be assumed that the exception was overruled and the evidence admitted. *Scarlett vs. Academy of Music*, 132.
3. Where an exception was taken to all the evidence offered, and especially to a specified portion of it; and there was no question as to the admissibility of any but that part specially objected to, all except that being clearly admissible. **HELD:**  
That there was no error in overruling the objection to the whole.  
*Ib.*
4. It is no error in the Court below to refuse to incorporate in a bill of exceptions, evidence given after said bill of exceptions had been signed and sealed. *Donohue vs. Shedrick*, 226.
5. An exception cannot be taken to the refusal of a Court to sign and seal a bill of exceptions. *Ib.*
6. A bill of exceptions to the ruling of a Court on demurrer to pleadings is an anomaly in this State. *Blake vs. Pitcher & Wilson*, 453.
7. A bill of exceptions stated, that having "offered evidence tending to prove the hypothesis of fact set forth in their prayer," \* \* \* "thereupon the plaintiffs offered the following prayer." **HELD:**  
That this mode of presenting in the bill of exceptions, a question of law, arising upon any given hypothesis of facts, is conformable to the new rules prescribed by this Court. *Ib.*

*See* APPEAL, &c., 3-8.

JUSTICE OF THE PEACE, 1, 2.

PRACTICE IN THE COURT OF APPEALS, 1, 2.

## EXECUTION.

1. In an action on a collector's bond, judgment was entered in 1866, for the penalty of the bond, "to be released on payment of the amount of the Comptroller's certificate, and subject to such insolvencies and

EXECUTION—*Continued.*

removals as may be certified to the Treasurer by the County Commissioners." On the 12th of August, 1869, the certificate of the Comptroller was filed in the case showing the amount due the State with interest, and the judgment was extended for this sum. Afterwards the judgment was credited upon the Comptroller's certificate with certain sums for insolvencies, and afterwards, on the same authority, with a further sum for interest upon the judgment, which was "remitted or authorized to be done by law." This judgment was afterwards satisfied by the payment of the whole amount due thereon, by W. one of the sureties, and the administrators of S. another surety, who had died before the institution of the suit; and thereupon the judgment was entered to the use of W. for one-half the amount then due thereon, and to the use of the administrators of S. for the other half of said amount. Afterwards an attachment on the judgment was issued by W. and the administrators of S., and laid in the hands of J. upon certain funds alleged to be held by him as county treasurer, the same being the surplus proceeds of the sale of land, assessed to the principal debtor in the judgment for taxes due and unpaid by him. On motion to quash the attachment, it was HELD:

- 1st. That the credits on the judgment could not now be urged against its validity.
- 2nd. That the defendants in the original suit having appeared by attorney, and no pleas having been filed, it must be assumed, that the judgment was entered by the consent of their attorney.
- 3rd. That inasmuch as S. had no judgment recovered against him, but had died before the suit was begun, his administrators were not entitled to an assignment of the judgment recovered against the principal and the other sureties, and to execution thereon, notwithstanding they may have satisfied the said judgment.
- 4th. That to entitle a surety to an assignment and execution against his co-sureties under sec. 7 of Art. 9 of the Code, it is incumbent upon him not only to satisfy the judgment, but to pay the *whole amount* of it.
- 5th. That if W. had satisfied the judgment in this case, that is *paid the balance* due upon it, he was entitled to an execution against his *principal*, but *not* against his *co-sureties*, for it appeared he did not pay the *whole* debt for which the judgment was rendered.
- 6th. That he could not, however, join with the administrators of S., even if they were entitled to an assignment and execution, as the assignment was not to them jointly, but one-half to each of them.
- 7th. That such joinder was therefore fatal to the attachment.  
*Wilson, et al., Adm'rs vs. Ridgely, et al., 235.*

EXECUTION—*Continued.**See* ATTACHMENT, 1.

JUDGMENT, 1.

MORTGAGE, 12.

SHERIFF, 2.

SURETIES, 17.

## EXECUTORS.

1. On a bill in equity by residuary legatees, to enforce the personal liability of sureties on a testamentary bond for a *devastavit*, alleged to have been committed by an executor. **Held:**

Although an executor strictly speaking may be considered as a trustee, and as such may be held accountable in a Court of equity for a proper administration of the trust, yet it is clear that the sureties maintain no such relation. On the contrary, their obligation being one of contract, the remedy for a breach of it must, as a general rule, be by an action at law on the bond.

*Edes, et al. vs Garey and Lanahan, 24.*

2. If there be any exception to this general rule, there must be *special and peculiar circumstances*, making the exercise of jurisdiction necessary to the protection of the rights and interests of parties. *Ib.*
3. Under the will of *E.*, *C.* was appointed both executor and trustee. On a bill in equity against the sureties on the bond given by *C.* as executor, it was alleged that as executor *C.* received large sums of money belonging to the estate, which by his act were wholly lost and wasted. That the Orphans' Court upon his application passed an order directing him to transfer to himself, as trustee under the will, the amount remaining in his hands as executor. That under the will it was his duty as executor to have kept together said estate until the death of the testator's mother, a contingency which had not happened when said order was passed; that the order was *ex parte*, and never in fact and in good faith complied with by *C.*, nor was any security given by him for the money thus unlawfully directed to be transferred to himself as trustee, except an *unrecorded conveyance of certain lots of ground in the City of Baltimore to himself as trustee for the parties in interest under the will*, which was found among his papers after his death. That under a creditor's bill subsequently filed by the creditors of *C.*, these lots were sold and the proceeds of sale brought into Court for distribution, and the complainants came in by petition in that case claiming as general creditors of *C.*, and also claiming under *said unrecorded deed to himself as trustee, a specific lien upon the proceeds of the sale of said lots of ground.* That the specific lien thus claimed was allowed by the Court, and the entire net proceeds of said sale was, under the

EXECUTORS—*Continued.*

order of the Court, paid to them. And that the defendants had personal knowledge of the above matters from having been the counsel of C. as executor and trustee, and especially advising him in regard to said transactions. **Held:**

- 1st. That the above allegations when considered separately or together present nothing more or less than an ordinary case of a *devastavit* by an executor, for which the complainants had a *plain, adequate and complete remedy at law.*
- 2nd. That there was not a particle of evidence necessary to prove either one or all of the material facts averred in the bill, but what could be offered in a Court of law, and upon the facts thus established, it was within the province of a jury under instructions from the Court to have determined the rights and liabilities of the parties.
- 3rd. That the death of C. the executor, in no manner affected the liability of his sureties as surviving obligors in an action at law.
- 4th. That there was nothing in the record to justify the jurisdiction of a Court of equity, upon the ground of complication of accounts, or mutual and adverse claims, or controlling equities.
- 5th. That under the facts and circumstances disclosed by the record the complainants were precluded from recovering against the defendants as sureties of C.
- 6th. That the order of the Orphans' Court, directing C. to transfer to himself as trustee, under the will, the amount remaining in his hands as executor, was passed by a Court having jurisdiction of the subject-matter, and the complainants as parties in interest under the will are presumed to have had notice of it.
- 7th. That common sense and common justice require that, having claimed and having received the entire proceeds from the sale of the property conveyed by the unrecorded deed upon the express ground, that it was executed by C. to secure the complainants on account of the money belonging to them, and which he held as trustee under the will, they should not be permitted to deny those facts in a suit brought against the sureties on the administration bond. *Id.*

*See* TRUSTEES, 1.

## FALSE IMPRISONMENT.

*See* MALICIOUS PROSECUTION.

## FÈME COVERT.

*See* HUSBAND AND WIFE.

## FORECLOSURE.

*See* MORTGAGE, 3.

## FORFEITURE.

The charge of excessive tolls by a corporation, under a mistaken construction of its powers, is no ground for a forfeiture of its charter, *State vs. Consolidation Coal Co.*, 1.

See CORPORATIONS, 1.

SCIRE FACIAS, 1.

## FRANCHISES.

See CORPORATIONS, 1.

## FRAUD.

1. Fraud is never presumed, and to justify a Court of equity in setting aside or in any manner interfering with a judgment on this ground, the fraud must be clearly and conclusively established. *Hill vs. Reifsnider, et al.*, 555.
2. The burden of proof is on the complainant to prove his case as it is alleged by the bill, and circumstances of mere suspicion will not warrant the conclusion of fraud. *Ib.*
3. A Court of equity will not restrain the execution of a judgment, unless it shall appear, that the complainant had a valid defence of which he could not have availed himself at law, or of which he might have availed himself, but was prevented by mistake, surprise or fraud unmixed with any fault or negligence of his own. *Ib.*
4. On a bill filed to restrain the execution of a judgment on the ground of fraud, it was HELD :
  - 1st. That the complainant had not made out a case entitling him to have the judgment set aside.
  - 2nd. That inasmuch as there appeared to have been usurious charges against him in the transactions between him and the defendants, he was entitled to have the judgment reduced to the sum found to be due by charging him with the net amount loaned him, and the average interest thereon, and allowing him for the amount of credits to which he was entitled, including bonus and interest on bonus.
  - 3rd. That although it was quite probable that this method did not ascertain the precise amount of usury paid by the complainant, yet no more could be allowed him, as there was no proof in the record to justify the Court in allowing any more, owing to the defective manner in which the complainant had kept his accounts, and his own forgetfulness of matters material to their elucidation. *Ib.*

See LIMITATIONS, 1.

## FRAUDS—STATUTE OF.

1. D. & Co. sued B. upon the following agreement signed by B. and others, but not under seal. "We the undersigned take pleasure in

FRAUDS—STATUTE OF.—*Continued.*

recommending S. to D. & Co. We also severally agree to become responsible for \$350 to said D. & Co. to be forthcoming in thirty days after the final delivery of the work." **HELD:**

- 1st. That the consideration for this guaranty could not be collected, or implied with *certainly* from the *instrument itself* without recourse to parol proof, or to other papers unconnected with it save by such proof.
  - 2nd. That parol testimony for the purpose of showing that the guaranty did refer to a contract between S. and D. & Co., and thus make out a consideration for it was wholly inadmissible if objected to.
  - 3rd. That such testimony having been introduced in the Court below *without objection*, an instruction by the Court below, that the guaranty was not sufficient to bind the defendant for want of a consideration, was wrong, and the judgment of that Court must be reversed; but,
  - 4th. That inasmuch as it was apparent, that upon a new trial this testimony would be rejected, and there appeared to be no other possible ground on which the plaintiffs could recover, no new trial would be awarded, without good cause shown in a special application therefor by the plaintiffs' counsel. *Deutsch, et al., use of Kanders vs. Bond*, 164.
2. An agreement in relation to lands, and tending to create a trust in relation thereto, cannot be proven by parol evidence, because it would be contrary to the 7th section of the Statute of Frauds. *Keller vs. Kunkel*, 565.

## GIFT.

*See* ADVANCEMENT, 4, 5.

## GRADES.

*See* BALTIMORE CITY, 3.

## GUARANTY.

*See* SURETIES, 4-9.

## GUARDIAN AND WARD.

1. F. and his wife made a deed to K. of certain property on Hoffman street, which was absolute on its face. The deed was executed and recorded without K. having been consulted with respect to it, and without any knowledge on his part of its having been done until some time afterwards, and after F. was shown to have been in very embarrassed circumstances. That property was subsequently sold under a mortgage, and K. applied by petition to the Court having the distribution of the proceeds of sale, to have the balance of the



GUARDIAN AND WARD—*Continued.*

purchase money after the payment of the mortgage debts, applied to the payment of his debt, which was accordingly done. His petition did not state whether he had accepted the deed in satisfaction of his debt or as collateral security for its payment. **HELD:**

1st. That K. was not estopped from denying in the present action, that he accepted the deed of the property in satisfaction of his debt, or showing that he accepted it only as security for his payment.

2nd. That the use that K. made of the deed upon his petition to have the surplus of the property thereby conveyed, applied to the payment of his claim against the trustee, was perfectly consistent with the fact that he had accepted it as collateral security for its payment; and such acceptance in no manner affected or altered the liability of the sureties on the bond.

**HELD further:**

1st. That the guardian of K. during his minority had no right, without authority from the Orphans' Court for that purpose, to invest her ward's money, and certainly none to confer such right upon the trustee.

2nd. That even if the trustee had received such authority from K. himself after he was of full age, neither the trustee nor his sureties would be released from their liability on the bond, unless the authority to invest had been executed in good faith for the benefit of K. *Forrester, et al. vs. State, use of Kernan*, 154.

- 2 A suit was brought in the year 1860, against C. and his two sureties T. and S. on a guardian's bond. Upon the suggestion of the death of the principal at May Term, 1865, it was continued against T. and S. as surviving obligors. In July, 1870, the declaration was filed together with the bond sued on. The declaration averred the execution of the bond by T. and S., and their failure to pay the amount thereof. The defendants pleaded general performance on the part of C. The plaintiff then replied setting out the names of the obligors in the bond with particularity, stating the death of C. the guardian, and assigning breaches. To this replication issue was joined, and the case was tried before a jury. Upon a motion in arrest of judgment, it was **HELD:**

1st. That upon the pleadings there was no ground for the objection, that the replication was a departure from the declaration by reason of its referring to a writing obligatory of two joint obligors, while the replication set out a bond by which a third party not named in the declaration was bound as principal, and they as sureties.

GUARDIAN AND WARD—*Continued.*

2nd. That the case having been brought to an issue upon the replication, the pleadings presented a sufficient cause of action, and when the bond was offered in evidence there could have been no valid objection to it upon the ground of a difference between the *allegata* and *probata*.

3rd. That the defendants having failed to demur to the replication, and the case having been tried upon its merits upon issue joined to the replication, the objection on the ground of a variance was not tenable upon a motion in arrest of judgment. *Trippe, et al. vs. State, use of Cox, et al.*, 512.

- 3 The condition of the bond sued on, was that the guardian should faithfully account with the Orphans' Court as directed by law for the management of the property and estate of the ward under his care, and deliver up said property agreeably to the order of said Court or the directions of law. The replication averred a failure to account, and the non-payment over of the money alleged to be due the ward.

**HELD:**

That this was a substantial allegation of a breach of the condition of the bond.

4. The replication did not allege that the ward had become of age before the suit was brought. **HELD:**

1st. That demand and default to pay were alleged and this was sufficient.

2nd. That if the party had no right to sue, this could have been put in issue by the pleadings, and was the proper subject of proof, and the failure to aver that the ward had arrived at age, was not a tenable ground for objection on the motion in arrest of judgment.

3rd. That it was not necessary that suit should have been prosecuted against the guardian or his insolvency alleged before the bond became liable to an action. *Id.*

• **HEARSAY.**

*See EVIDENCE, 1.*

**HIGHWAY.**

*See NUISANCE, 1, 2, 3, 4.*

**HUSBAND AND WIFE.**

1. In order to charge the debts contracted by a married woman upon her separate estate as a lien in equity, it is necessary that it should affirmatively appear, that her contract was made with direct reference to her separate estate, and that it was her intention to charge the same. *Wilson & Hunting vs. Jones, et al.*, 349.

HUSBAND AND WIFE—*Continued.*

2. A bill was filed against a *fême covert* and her trustee for the purpose of charging her separate estate with a lien for materials furnished by the complainants for the improvement of the same; the bill did not aver that there was any contract by her to bind her separate estate, or any intention on her part to create a charge or specific lien thereon for the payment of the complainant's claim. On demurrer to the bill, it was **HELD**:

That the bill stated no case entitling the complainants to relief in equity, and that the demurrer should be sustained. *Id.* \*

*See* MORTGAGE, 4, 5, 6.

## HYPOTHECATION.

*See* MORTGAGE, 14.

## INCORPORATION.

*See* CORPORATION, 4, 5, 8.

ESTOPPEL, 1.

## INDEMNITY.

*See* BOND, 3.

## INDICTMENT.

*See* CONSTITUTIONAL LAW, 7.

## INJUNCTION.

1. On a bill filed by the American Coal Company against the Cumberland and Pennsylvania Railroad Company, for an injunction, prohibiting the latter from demanding or receiving from the complainant higher rates for transporting coal over the road of the defendant, than were fixed and prescribed by the Act of 1876, ch. 64, amending the latter's charter, it appeared that the complainant, which was a coal mining company, with its tram-road connecting with the railroad of the defendant, and depending entirely upon the latter for the means of transporting its coal to market was specially damaged by the illegal exactions by the defendant of excessive freights. **HELD**:

That the complainant was entitled to an injunction as prayed.

*American Coal Co. vs. Consolidation Coal Co., et al.*, 15.

2. In all *ex parte* applications for injunction, it is the duty of the complainant to make a *full and candid disclosure* of all the facts within his knowledge, touching the subject-matter in regard to which relief is prayed. There must be no *misrepresentation*, or *concealment*, or *keeping in the back-ground*, of important facts of which the Court ought to be advised. *Sprigg vs. Western Telegraph Co., et al.*, 67.
3. Where a complainant, seeking an injunction, omits from his bill material facts in regard to which he had knowledge, or was put upon the

INJUNCTION—*Continued.*

inquiry, and had the means of ascertaining, and ought to have ascertained them before instituting the proceeding, such omission is, in itself, a sufficient ground to disentitle him to this summary process of the Court. *Ib.*

4. On bill filed to restrain the execution of a judgment on the ground of fraud, it was HELD:

A Court of equity will not restrain the execution of a judgment, unless it shall appear, that the complainant had a valid defence of which he could not have availed himself at law, or of which he might have availed himself, but was prevented by mistake, surprise or fraud unmixed with any fault or negligence of his own. *Hill vs. Reifsnider, et al.*, 555.

See JUDGMENT, 1.

MORTGAGE, 12.

## INJURIES—PERSONAL.

See NUISANCE, 1.

## INSURANCE.

1. In an action on a policy of life insurance, after the plaintiff had closed her case, the defendant objected to the admissibility of the policy in evidence, and moved the Court to exclude it from the consideration of the jury, because the plaintiff had not offered in evidence the "application" for insurance. On appeal from the action of the Court below in overruling the motion, it was HELD:

That the question had become immaterial, inasmuch as the "application" was afterwards given in evidence by the defendant.

*Mutual Life Ins. Co. vs. Stibbe*, 302.

2. The insurance was effected on the life of S. The application for insurance showed that the wife of S. was one of the contracting parties. It was signed with her name as well as her husband's. He signed as the person whose life was insured, and she as the person for whose benefit the insurance was made. The covenant in the body of the policy was, "to pay to S. at the time named, if he should be then living, and if he should die previous thereto, to pay to his wife, C., or her legal representatives." The policy was executed by the company alone. HELD:
  - 1st. That the policy was to be regarded as a deed poll.
  - 2nd. That the covenant therein to pay to the wife was made directly with her, and there could be no valid objection to her maintaining a suit upon it in her own name.
3. By the terms of the policy the amount insured was payable in ninety days after satisfactory proofs of death. At the trial, the proofs of

INSURANCE—*Continued.*

death furnished in compliance with this requirement were offered in evidence by the plaintiff, for the purpose of showing such compliance. **Held:**

- 1st. That the same were admissible for that purpose and for no other, and their sufficiency was a question for the Court to determine.
- 2nd. That the said proofs, being also offered in evidence by the defendant, were admissible as declarations of the plaintiff.
- 3rd. That the statement of the plaintiff as to the cause of the death of the insured, accompanying said preliminary proof, did not properly constitute any part of the proof of death required by the policy, but was the mere declaration made by her of her opinion and belief as to the cause of the death, and as such the defendant was entitled to rely upon it before the jury; not as conclusive, but as evidence to be considered by the jury in connection with all the other evidence in the case, upon the question as to the actual cause of the death of the insured, a question which the jury alone could decide.
- 4th. That it would have been error to instruct the jury that any part of the evidence as to the cause of the death was to be taken by itself as conclusive. *Ib.*
4. The statement of the physician was, that the disease of which the insured died, was "*cerebral congestion*, caused proximately by mental anxiety and remotely by drink." By the terms of the policy, it was to be void "if the death shall be caused by the use of intoxicating drink or opium." **Held:**  
That the meaning of this provision was that the things prohibited, should be the *direct* cause of the death, in order to avoid the policy, and it was not error so to instruct the jury. *Ib.*
5. The plaintiff was insured by the defendant, (a fire insurance company,) "on the contents" of a frame barn, granary and stabling situated on his land called "*Widow's Care*." The property so insured was destroyed by fire, and when so destroyed was not in the buildings in which it was at the time the insurance was effected, but had been removed to another part of the same tract of land which the plaintiff had subsequently purchased. The plaintiff had applied to the defendant for permission to remove the personal property described in his policy to that part of *Widow's Care*, which he had so purchased and was then in his occupancy, and the defendant granted him that privilege and right to, and *endorsed said permission upon said policy*, and in pursuance of said permission the removal was made. The endorsement of said permission was signed by the secretary of the

INSURANCE—*Continued.*

company, *but was not under seal*, and was in these terms: "Permission is hereby granted to assured to remove the personal property insured within to the property now occupied by him, and insured to J. S. by policy No. 832." One of the conditions annexed to and made a part of the plaintiff's policy, provided that "insurance on contents of buildings shall be taken to include every species of personal property therein." The plaintiff having sued the company *in covenant* to recover for the loss, on demurrer **Held** :

1st. That the risk which the policy covered as respects the property in question, continued only so long as it remained in the buildings in which it was at the time the policy was issued.

2nd. That the plaintiff therefore had no cause of action against the company for this loss, except by virtue of the permission endorsed upon the policy.

3rd. That as there was no provision in the policy authorizing the endorsement of the permission to remove the property from the original buildings, said endorsement was a new and distinct contract by parol upon which the action of *covenant* would not lie. *Shertzer vs. Mut. Fire Ins. Co. of Hartford Co.*, 506.

6. This case distinguished from that of *The Md. Fire Ins. Co. vs. Guedorf*, 43 *Md.*, 506. *Ib.*

*See* MORTGAGE, 1, 2, 3.

## INVENTORY.

*See* ORPHANS' COURT.

## IRREGULARITY.

*See* PLEADINGS, 4.

## ISSUE.

*See* WILLS, 3.

## JOINT OR SEVERAL OBLIGATION.

*See* CONTRACT, 1, 2, 3, 4.

## JUDGMENT.

1. On a bill filed to restrain the execution of a judgment on the ground of fraud, it was **Held** :

1st. A Court of equity will not restrain the execution of a judgment, unless it shall appear, that the complainant had a valid defence of which he could not have availed himself at law, or of which he might have availed himself, but was prevented by mistake, surprise or fraud unmixed with any fault or negligence of his own.

JUDGMENT—*Continued.*

2nd. That the complainant had not made out a case entitling him to have the judgment set aside.

3rd. That inasmuch as they appeared to have been usurious charges against him in the transactions between him and the defendants, he was entitled to have the judgment reduced to the sum found to be due by charging him with the net amount loaned him, and the average interest thereon, and allowing him for the amount of credits to which he was entitled, including bonus and interest on bonus.

4th. That although it was quite probable that this method did not ascertain the precise amount of usury paid by the complainant, yet no more could be allowed him, as there was no proof in the record to justify the Court in allowing any more, owing to the defective manner in which the complainant had kept his accounts, and his own forgetfulness of matters material to their elucidation. *Hill vs. Reifsmider, et al.*, 555.

*See* CORPORATIONS, 10.

EVIDENCE, 6.

JUSTICE OF THE PEACE, 1.

MORTGAGE, 12.

RECORDS, 2, 3.

SURETIES, 1, 17.

## JURISDICTION.

*See* ELECTIONS, 1.

EQUITY, 1, 2.

JUSTICE OF THE PEACE, 1, 3.

MANDAMUS, 1.

## JURY.

1. The jury are not the tribunal to determine what would constitute a legal dedication of a way to public use. They are competent to find the existence of facts to fulfil the definition of what would constitute such a dedication, but not to determine the definition itself. *Maenner vs. Carroll, et al.*, 193.

2. The jury have nothing to do with rejected prayers, and counsel should not be allowed to refer to them for the purpose of influencing the conclusions of the jury in regard to the facts before them. *Id.*

*See* INSURANCE, 4.

NOTICE, 1.

PRAYERS AND INSTRUCTIONS, 2, 5.

## JUSTICE OF THE PEACE.

1. In this State bills of exception are not allowed in the trial of cases upon appeals from judgments rendered by justices of the peace. If a party to such a suit desires to raise the question of jurisdiction, he must do so before the justice, by filing the allegation verified by affidavit prescribed by the 33rd section of Art. 51 of the Code, or by plea or other proper proceeding when the case is in the Circuit Court upon appeal. *Cole vs. Hynes, et al.*, 181.
2. This Court is not at liberty to examine the bill of exceptions in the case for the purpose of discovering whether title to land was or was not involved in the case. *Ib.*
3. Where the cause of action before the justice of the peace, is a balance of the purchase money for land,—in order to oust the justice of jurisdiction of the case, it must appear affirmatively on the face of the proceedings that the defendant has not accepted a deed of the property, but that the contract is still executory. *Ib.*

## LACHES.

*See* MORTGAGE, 6.  
TRUSTEES, 1.

## LAND.

*See* JUSTICE OF THE PEACE, 3.

## LAW AND FACT.

*See* INSURANCE, 3.

## LEASE.

1. The Peabody Heights Company of Baltimore City, sub-leased certain parcels of ground to A. J. G., who afterwards assigned his interest to J. B. The deeds of sub-lease contained a covenant for renewal in these terms: "and also, that at any time during the continuance of this demise, the Peabody Heights Company of Baltimore City aforesaid, or its assigns, shall, and will, on payment to it or them of ten dollars as a fine therefor, execute and deliver, or cause and procure to be executed and delivered to the said A. J. G., his executors, administrators or assigns, at his or their request and cost, a new sub-lease of the above described parcels of ground and premises, or either of them, reserving to the said lessor a reversion of one day therein, which new sub-lease shall be subject to the same rents and contain the like covenants as are herein contained; and in particular a covenant for perpetual renewments, so that this lease, and the estates created thereby, and each and every of them shall be renewable, and renewed from time to time forever." **Held:**



LEASE—*Continued.*

- 1st. That like all other contracts the real intention of the parties to this covenant must control its interpretation.
- 2nd. That the purpose of the covenant was to preserve the lease for its original term, and the estates which it created, and to continue them forever.
- 3rd. That to accomplish this and carry out the intention of the parties, a new lease if required under this covenant, should be made to commence and take effect from the expiration of the original term.
- 4th. That the insertion of words in the covenant stating expressly when the new term should commence, was not necessary, if by other terms and provisions, and the character of the whole instrument the same intention was made to appear.
- 5th. That such intention was manifest upon the face of the said conveyance. *Boyle vs. Peahody Heights Co. of Balto. City*, 623.
2. On a bill filed by J. B. against the sub-lessor, claiming a renewal of said sub-leases to take effect at once, it was alleged that there were certain inaccuracies in the description of two of the lots, which the complainant was entitled to have corrected, it was HELD :  
That J. B. was not entitled to relief upon this ground without making the sub-lessee a party to the bill, and requiring him to be united in the new lease. *Ib.*

See COVENANT, 1.

## LEASEHOLD.

A disposition of leasehold estate must be treated as a testamentary disposition of personal estate. *Prevost, &c. of Dumfries vs. Abercrombie, et al.*, 172.

## LEGISLATURE.

See CONSTITUTIONAL LAW, 4.

## LETTERS.

1. A letter which is *per se*, and without further proof, inadmissible in evidence, may become admissible, when it is followed by further proof, as purporting to give notice of the fact stated therein, and its admission will not be ground for reversal, particularly when no injury was done to the appellant thereby. *Roberts, et al. vs. Woven Wire Mattress Co.*, 374.
2. Where letters were read to the jury by one party to a cause without objection or statement of the purpose; after the limitation of their effect upon the objection of the other party, it is not the province of the Court, *sua sponte*, to undertake to define any other purpose for which they might be used. *Ib.*

See EVIDENCE, 5, 7, 8.

LIMITATIONS, 3.

## LEVY.

See SHERIFF, 2.

## LICENSE.

See NUISANCE, 2, 3, 4.

## LIEN.

See BROKER, 1.

MECHANICS' LIEN, 1.

MORTGAGE, 1.

## LIMITATIONS.

1. The Act of 1868, ch. 357, provides, that "In actions hereafter brought where a party has a cause of action, of which he has been kept in ignorance by the fraud of the adverse party, the right to bring the suit shall be deemed to have first accrued at the time at which such fraud shall, or with usual and ordinary diligence might have been known or discovered." HELD:

1st. That it was not thereby meant that in all cases a party must commit a fraud *distinct* from, and *independent* of the original fraud, for the purpose of keeping the injured party in ignorance of his cause of action, nor that the mere concealment of the fraud is insufficient.

2nd. That where one practices fraud to the injury of another, the *subsequent concealment* of it from the injured party is *in itself a fraud*, and if he is thereby kept in ignorance of his cause of action, he is kept in ignorance by "the fraud of the adverse party." *Wear vs. Skinner*, 257.

2. In an action of deceit brought to recover damages for an alleged fraud, by which the plaintiff was induced to assign to the defendant his interest in a firm of which the two had been members; upon a plea of the Statute of Limitations and replication thereto, it was HELD:

That if the plaintiff was induced to assign to the defendant his interest in said firm by fraud practiced on him by the defendant, and such fraud was concealed from him by the defendant, whereby he was kept in ignorance of his cause of action, then his right to bring the suit must be deemed to have first accrued when such fraud was, or with usual and ordinary diligence might have been discovered. *Ib.*

3. In an action by G. against K. as executrix of her husband, the plaintiff, for the purpose of taking his case out of the operation of the Statute of Limitations, offered in evidence a letter addressed to the plaintiff's attorney by the attorney for the defendant, in these words: "About claim against Mrs. K. please inform me what it is. The executrix will pay it if just." HELD:

LIMITATIONS—*Continued.*

That said letter was inadmissible for that purpose. *Goldsmith vs. Kilbourn, Ex'x*, 289.

4. The payment by the principal, year by year, of the interest on a joint and several promissory note, will prevent the Statute of Limitations from attaching to the note in favor of the surety. *Schindel vs. Gates*, 604.
  5. The rule on this subject, laid down in *Ellicott vs. Nicols*, 7 *Gill*, 86, has been the accepted law of this State for nearly thirty years, and in the absence of legislation to the contrary, it is not to be questioned. *Id.*
- See* MORTGAGE, 6.  
WILLS, 3.

## MALICE.

*See* MALICIOUS PROSECUTION, 3.

## MALICIOUS PROSECUTION.

1. Proceedings were instituted before a justice of the peace by the assignee in bankruptcy of F. to recover of W. a claim alleged to be due the bankrupt's estate. At the trial F. was a witness, and testified that W. had the use of his horse and wagon for the purpose of hauling bricks, the charge for which use constituted a part of the claim sued for. F. was subsequently arrested at the instance of W., charged with having committed perjury in swearing that W. had the use of the cart and wagon. In an action afterwards brought against W. by F. for a malicious prosecution in so having him arrested, F. offered to prove by his assignee in bankruptcy the amount claimed by the latter to be due from W. in the proceedings before the justice of the peace, and the several credits to which he admitted W. was entitled. On objection, it was HELD:

That the said testimony was irrelevant and inadmissible. *Flickinger vs. Wagner*, 580.

2. The defendant proved by his brother that there had been a settlement in June, 1872, between the witness and the plaintiff of all the accounts between the plaintiff and defendant. That in said settlement, the plaintiff's account against the defendant had been credited with the amount due by the plaintiff on a note of his held by the defendant, but which note had not been surrendered to the plaintiff, but remained in the hands of the defendant. That the account settled on that occasion was an account which the plaintiff had against the defendant for bricks, and that witness had informed the defendant the day after the settlement, that he had settled all claims which the plaintiff had against him. The plaintiff upon cross-examination of said witness, asked him if there was anything due upon said

MALICIOUS PROSECUTION—*Continued.*

note, which question being objected to, his counsel stated they expected to prove facts and circumstances from which the jury might find that no such settlement as that spoken of by the witness had been made; that subsequent to the supposed settlement the defendant had attended a meeting of the plaintiff's creditors held to elect an assignee in bankruptcy, and had there produced said note before the register in bankruptcy, and proved it against the estate of the plaintiff, and offered to vote upon it for witness as assignee of the said bankrupt's estate. **HELD:**

- 1st. That under such circumstances and for such purposes the question was a proper one.
  - 2nd. That it was competent for the plaintiff to prove, that the defendant was present at the meeting of creditors, and voted for an assignee of the bankrupt's estate.
  - 3rd. That it was not competent for him to ask the witness, who was not present at the meeting, whether the defendant had voted for him as assignee.
  - 4th. That it was not competent for him to ask said witness, whether the plaintiff was indebted to the defendant at the time of the trial before the justice of the peace, such question being irrelevant.
  - 5th. That it was competent for him to ask said witness if the said note had been cancelled by the credit on the brick account spoken of by him.
  - 6th. That it was not competent for the plaintiff to ask said witness a question, the answer to which would have been nothing more than the opinion of the witness. *Ib.*
3. The defendant was having a house built, and in the suit against him before the justice of the peace, he was charged with having the use of the plaintiff's cart and wagon in hauling bricks for this house. **HELD:**

- 1st. That for the purpose of showing the circumstances which induced the defendant to believe that the plaintiff had testified falsely before the justice of the peace, it was competent for him to prove by a witness, that under the contract of said witness with the defendant, he, (witness,) was obliged to haul the bricks, and that he borrowed and used the plaintiff's wagon for that purpose.
- 2nd. That the motive which operated upon and induced the defendant to have the plaintiff arrested being directly involved in the issues before the jury, the defendant, being a competent witness under the Evidence Act, had the right to explain to the jury the motives under which he acted.

MALICIOUS PROSECUTION—*Continued.*

- 3rd. That it was not competent for the plaintiff to ask said defendant upon his cross-examination, what was the matter in controversy between him, (defendant,) and the assignee of the plaintiff in the trial before the justice of the peace; or whether there was any controversy in the trial before the justice, as to whether witness went for the cart *by himself*, or in company with somebody else, said questions being irrelevant.
- 4th. That the fact that the defendant was informed, and believed that the settlement made by his brother with the plaintiff, included all matters of account between them, did not furnish a reasonable cause for his believing that the plaintiff committed perjury, when he subsequently testified before the justice of the peace, that the defendant was indebted to him for the use of the cart and wagon. And more especially in view of the insignificant amount involved in the plaintiff's testimony, (three dollars,) which if recovered would have gone not to himself but into his bankrupt estate.
- 5th. That in order to constitute a reasonable and probable cause in cases of this kind, the facts and circumstances must be such as not only to create a bare suspicion, but must be sufficiently strong to satisfy a cautious man that the party is guilty of the charge.
- 6th. That proof that the defendant never had the use of the cart in question, and that it never was in fact used in and about his premises, and that he knew this, would be evidence to justify the defendant in believing that the plaintiff was guilty of the charge for which he was prosecuted, although the defendant was mistaken in so believing, and the plaintiff was not guilty of any such charge.
- 7th. That it was necessary for the plaintiff to prove, that the defendant was actuated by *malice*, and also without probable cause.
- 8th. That when the circumstances are such as to constitute a *reasonable* cause, the *motive* which actuates a party in making an arrest is altogether immaterial.
- 9th. That the fact that the defendant had dismissed the charge of perjury against the plaintiff, was not in itself sufficient evidence to prove that he had not probable cause for instituting the prosecution before the magistrate. *Ib.*

## MANDAMUS.

1. Applications for mandamus and the proceedings therein, are conducted upon the law side of the Court and not in equity. *Watts vs. President, &c. of Port Deposit*, 500.

## MANDAMUS—Continued.

2. To warrant an appeal there must therefore be a final judgment in favor of the petitioner, granting the writ, or a final judgment in favor of the defendant, and dismissing the petition. *Ib.*
3. By the Act of 1876, ch. 101, certain persons therein named were appointed a board of examiners, and empowered to make assessments upon owners of land lying on or near Wilkins avenue, for the purpose of constructing and completing said avenue. The commissioners were directed to make a report of their proceedings to the Commissioners of Baltimore County, for their ratification, amendment or rejection; and the Act further provides, that any person interested in the proceedings *might appeal* from the final order of ratification or rejection of the report of the examiners to the *Circuit Court for Baltimore County*. The examiners having made the assessments according to the provisions of the Act reported the same to the commissioners, and the latter being of the opinion that the Act of 1876, was unconstitutional, rejected the report, and passed an order quashing all the proceedings there under. **Held:**

That a *mandamus* would not lie to compel the commissioners to carry out the provisions of the Act of 1876, as by the express terms of that Act the parties had a *full and adequate remedy by an appeal* to the Circuit Court for Baltimore County. *State, ex rel. Holland, et al. vs. County Comm'rs of Balto. County*, 621.

## MARRIED WOMAN.

*See* HUSBAND AND WIFE.

## MASTER AND SERVANT.

1. A plaintiff suing a railroad company to recover damages for injuries caused by a steam hammer of the company, while he was in said company's employ, cannot recover, although the injuries were caused by the defective condition of the hammer, or by negligence of the agents of the defendant, or by both combined, without showing also that the defendant did not use reasonable care in procuring for its operations sound machinery, and faithful and competent employ(s). *Hanrathy vs. North. Cen. Railway Co.*, 280.
2. And where in such action there was no evidence that the defendant was negligent in failing to employ competent and faithful employes, or in not procuring sound and sufficient machinery, but on the contrary the proof was uncontradicted, that B., the person in immediate charge of the hammer, and engaged in working it, and I. the foreman of the shop, were both first-class men for their positions, and that the hammer was of approved construction, and the best kind of hammer made when it was placed in the shop; although some evidence was offered

RAILROADS—*Continued.*

mer was of approved construction, and the best kind of hammer made when it was placed in the shop; although some evidence was offered by the plaintiff tending to prove, that the accident was caused by the steam hammer not being in good order and condition at the time, or by the negligence of B., it was **Held**:

- 1st. That the jury were properly instructed that the plaintiff had offered no evidence to show that such reasonable care was not used by the defendant.
- 2nd. That B. was a fellow-servant engaged in a common employment with the plaintiff, and the defendant would not be liable to the plaintiff for the consequences of his negligence, even if it had actually caused the accident.
- 3rd. That this principle applies, whether the alleged negligence of B. consisted in want of care in the management of the steam hammer, or in failing to report to the foreman that it was not in good order and needed repair. *Id.*
3. The plaintiff testified that he was employed to wheel scrap iron from the yard into the shop, where the hammer was, and to fill the tank with water and to bring ice, and that the first time he worked at the hammer was on the morning of the accident. **Held**:

That this did not affect his right to recover, inasmuch as it appeared from his own testimony, that he had been at work there for two months, made no objection when he was called on to work at the hammer, and voluntarily undertook that employment. *Id.*

*See* MASTER AND SERVANT, 1, 2.

MORTGAGE, 7-14.

WAYS, 1, 2, 3.

## RECEIVER.

1. In an action brought by a receiver, appointed to wind up the affairs of a corporation, by a decree which directs, that he "shall prosecute and defend all suits at law, that may now be pending or may be hereafter instituted, in which said corporation may be a party," it was **Held**:

1st. That as the cause of action arose before the appointment of the receiver, it was necessary in order to maintain the action in his name, that it should be made to appear there had been conferred upon him the power and authority to sue.

2nd. That such power and authority was conferred by the terms of the decree above set forth. *Hayes, Receiver vs. Brotzman, et al.*, 519.

RECEIVER—*Continued.*

2. The plaintiff receiver was not the person named as such in the original decree. But upon the refusal of the first receiver to act he was appointed in his stead with the same authority and powers. **Held:** That being substituted for the first receiver, the plaintiff was necessarily clothed with the authority and required to perform the duties of the first receiver. *Ib.*
3. The Act of 1868, ch. 471, sec. 195, provides that "whenever a receiver of the property or effects of a corporation, shall be appointed before the dissolution, or afterwards, new suits may be brought and carried on by any such receivers, either in their own names and capacity, or in the name of the corporation, for which they shall have been appointed; but no new suit shall be brought in the name of a corporation after it shall have been dissolved, or after the expiration of its charter." **Held:**
  - 1st. That apart from the authority expressed in the decree, the above section conferred ample authority to maintain the action.
  - 2nd. That the order of the Circuit Court appointing the receiver, being the order of a Court of competent jurisdiction to pass it, carried with it the presumption of regularity; and it was not necessary that the plaintiff should have offered proof, that the Circuit Court had acquired jurisdiction to pass the order by proper averments in the bill of complaint or petition.
  - 3rd. That the order standing in full force must be taken as establishing, at least *prima facie*, that all the necessary averments were made, and proceedings had to give jurisdiction to the Court.
  - 4th. That when the appointment of the plaintiff, as receiver, was established by the exhibition of the order of the Circuit Court of Baltimore City, his right to maintain the action was sufficiently shown.
  - 5th. That where a statute gives to the receiver a right to sue, there is no necessity to show special authority from the Court appointing him. *Ib.*

## RECORDS.

1. Under the Constitution, Art. 4, secs. 26 to 37, relating to the Courts of Baltimore City, the several Courts therein provided for, that is to say, the Superior Court, Court of Common Pleas, City Court, Circuit Court and Criminal Court, are distinct and separate bodies, neither having any authority or control over the clerks, the dockets or records of the others. *Goldsmith vs. Kilbourn, Ex'x*, 289.



RECORDS— *Continued.*

2. The proper mode of proving the proceedings and judgments of one of these Courts in any other Court, is by the production of a transcript thereof under seal duly certified. *Ib.*
3. The original dockets, or a mere copy of the docket entries, or the original papers, are not proper or admissible evidence for that purpose. *Ib.*
4. For the like reason the evidence of the deputy clerk of one of said Courts as to the loss of the papers in a case in said Court, is inadmissible in any other Court. *Ib.*
5. Where the record contains none of the proof taken in the case, the statement in the opinion of the Judge below as to what was proven before him is conclusive. *Smith, et al. vs. Shaffer, 573.*

## REDEMPTION.

*See* EQUITY OF REDEMPTION.

## REGISTRATION.

*See* MORTGAGE, 12.

## RELEASE.

*See* SURETIES, 13-17.

## REMAINDERS, CONTINGENT.

*See* WILLS, 3.

## REMEDY—ADEQUATE REMEDY AT LAW.

*See* MANDAMUS, 3.

## RENEWAL.

*See* LEASE, 2.

## REPAIRS.

*See* COVENANT, 1.

## REPEAL.

*See* STATUTES, 1.

## RE-ORGANIZATION.

*See* CORPORATIONS, 3.

## RES GESTÆ.

*See* ADVANCEMENT, 5.  
EVIDENCE, 7.

## RES INTER ALIOS.

*See* WILLS, 3.

## RESIDUARY LEGATEES.

*See* WILLS, 1.

## RESULTING TRUST.

*See* USES AND TRUSTS, 1, 2, 3.

## RETURN.

1. A *scire facias* against terre-tenants is, so far as they are concerned, a proceeding strictly *in rem*, and it is essential that the land to be affected by the judgment should be properly described. *Thomas, et al. vs. Farmers' Bank of Md.*, 43.
2. Whether a *scire facias* against terre-tenants be general or special, the particular lands of which they are tenants, remaining subject to the judgment lien, must be described in the sheriff's return; and in case of judgment the *feri facias* that issues upon it must give a sufficient description of it to enable the sheriff to levy upon it.
3. Where a *scire facias* was issued against three terre-tenants of T., and one of the defendants' pleas alleged that a part of the land of T. was purchased by each of two of the tenants named, under a decree for the enforcement of a vendor's lien, which was prior to the rendition of the judgment recited in the *scire facias*. **HELD:**  
That no identity or sufficient description of the land can be derived from such allegation. *Ib.*
4. Where, in a *scire facias* against terre-tenants, there is no sufficient description of the lands appearing of record, either by the sheriff's return or in the pleadings, the Court cannot resort to the evidence offered to the jury for the purpose of obtaining a description of the lands against which to render the judgment. *Ib.*

## RIGHT OF WAY.

See NUISANCE, 1, 2, 3.

## ROAD.

See WAYS, 1.

## RULE—IN SHELLEY'S CASE.

See WILLS, 1, 3.

## RULE OF THE COURT OF APPEALS, No. 4.

See PRAYERS, &c., 3.

## RULES—SECURITY FOR COSTS.

See PRACTICE, 2.

## SALARY.

See AGREEMENT, 2.

## SALE.

See AGREEMENT, 2.

MECHANICS' LIEN, 3.

MORTGAGE, 4, 6, 14.

SHERIFF, 2, 3.

## SCIRE FACIAS.

1. While it is clear that proceedings by *scire facias*, or otherwise, against a corporation for the forfeiture of its charter, cannot be maintained,

SCIRE FACIAS—*Continued.*

except by the sanction and authority of the Legislature, a special Act of Assembly for this purpose is not required. *State vs. Consolidation Coal Company*, 1.

2. It is competent for the Legislature, instead of passing a special Act authorizing such proceedings to be instituted in a particular case, by a general law to authorize suits for this purpose to be instituted at the instance of private parties, as was done by the Act of 1818, ch. 177, sec. 4, codified in Art. 12 of the Code; or to confer the power upon the Governor to cause the proceeding to be instituted in his discretion, whenever he may consider the public interests so require; and this power has been conferred by sec. 176 of the Act of 1868, ch. 471. *Ib.*
3. The plaintiff, in a special *scire facias* against terre-tenants must name all the tenants holding lands subject to the lien of the judgment; if he omit to do so, those who are named may plead in abatement. *Thomas, et al. vs. Farmers' Bank of Md.*, 43.
4. A *scire facias* against terre-tenants is, so far as they are concerned, a proceeding strictly *in rem*, and it is essential that the land to be affected by the judgment should be properly prescribed *Ib.*
5. Whether a *scire facias* against terre-tenants be general or special, the particular lands of which they are tenants, remaining subject to the judgment lien, must be described in the sheriff's return; and in case of judgment the *feri facias* that issues upon it must give a sufficient description of it to enable the sheriff to levy upon it. *Ib.*
6. Where a *scire facias* was issued against three terre-tenants of T., and one of the defendants' pleas alleged that a part of the land of T. was purchased by each of two of the tenants named, under a decree for the enforcement of a vendor's lien, which was prior to the rendition of the judgment recited in the *scire facias*. HELD:  
That no identity or sufficient description of the land can be derived from such allegation.
7. Where, in a *scire facias* against terre-tenants, there is no sufficient description of the land appearing of record, either by the sheriff's return or in the pleadings, the Court cannot resort to the evidence offered to the jury for the purpose of obtaining a description of the lands against which to render the judgment. *Ib.*

See CORPORATIONS, 1.

FORFEITURE.

## SECURITY FOR COSTS.

See PRACTICE, 2.

## SEIZURE.

See SHERIFF, 2.

## SHELLEY'S CASE—RULE IN.

See WILLS, 3.

## SHERIFF.

1. J. L. and W. B. L. of the City of Baltimore, entered into the following agreement:

"Whereas, the said W. B. L. is desirous of carrying on and conducting the retail liquor business, at 51 East Lombard street, in said city, but is unable to do so, because of his inability to furnish stock and capital necessary in said business; and whereas, said W. B. L. is without means of his own, the said J. L. has consented to aid him upon the terms and conditions hereinafter named.

"Now this agreement witnesseth, that the said J. L. agrees to furnish and deliver to said W. B. L., as his agent, all such liquors, wines, &c., which he may require in said business, at the usual wholesale prices, so long as it shall be agreeable for him to do so, and said W. B. L. shall faithfully comply with this agreement. It is expressly understood and agreed, however, that said W. B. L. shall conduct and carry on said business only as the agent of said J. L., that the stock in trade furnished as aforesaid shall be and remain the absolute property of the said J. L., and that all goods shall be sold for and on the account of said J. L., and all bills for goods sold shall be made out in the name of said W. B. L., as agent aforesaid, and in no other manner; and said W. B. L. shall account to said J. L., at least once a month, for all goods delivered to him under this agreement, and shall pay over the wholesale price of such goods, and retain for his labor and attention in said business such profits as shall be made." *Albert, Sheriff vs. Lindau*, 331.

2. In an action brought against the Sheriff of Baltimore City, by J. L. for an alleged illegal seizure and sale of goods in the store of W. B. L. under executions against the latter, and which goods the plaintiff claimed as his under the above agreement. **HELD:**

1st That although there were some features in this instrument of an unusual character, and tending to arouse suspicion as to its *bona fides*, the Court could not pronounce it void upon its face.

2nd. That there was no legal principle which would make void an agreement like this, if executed and carried out in good faith.

3rd. That upon the assumption that it was so executed, and was thus being carried out, and that the goods levied on by the sheriff at the instance of the judgment creditors, were duly furnished under it, and were in the store at the time of the

SHERIFF—*Continued.*

levy, there was no reason why he should not be responsible for seizing and selling them, said creditors having recovered their judgments more than two years before the agreement was entered into.

4th. That the case would be quite different with respect to subsequent creditors, who might be fairly presumed to have been misled by the false credit which such possession and ownership might give.

5th. That under the above assumption, the plaintiff was entitled to recover the value of the goods seized, provided the same *did not exceed the amount* owing to him by W. B. L. under the agreement, with interest in the discretion of the jury.

6th. But if the goods were in fact sold to W. B. L. *on credit*, instead of being entrusted to him for sale *as agent*, or if the agreement referred to was merely colorable, not made in good faith, and was intended to be used for the purpose of protecting property, which was actually sold to and belonged to W. B. L. from his creditors, under the guise of an agency, then the goods could be seized on execution both by his antecedent and subsequent creditors.

7th. That if J. L. delivered the goods in the store to W. B. L. at a *fixed price*, being the wholesale market price for such goods at the time of delivery, and charged the same to W. B. L. on his books, and authorized him to sell and dispose of them as if they were his own, and W. B. L. was to receive all the profits of such sales, and *was to sustain all losses* arising therefrom, or which might be incurred by injury to or destruction of the goods, and was not to receive any commission or salary, and *was never required to account* for such sales, nor to render any account of the same from time to time, except that he was simply *to pay for the goods* the prices charged on the books of J. L., (the same being the wholesale price of the same,) and in the bills for the goods sent to W. B. L. by J. L. at the time of delivering the same, and said bills so rendered, were in the ordinary form of sale bills made out to a purchaser of goods,—then there was in effect a waiver or an abandonment of the agency contract, and the protection it would otherwise have afforded to J. L.'s asserted ownership of the goods, and constituted in law a sale of them on credit accompanied by delivery.

8th. That where all the elements of such a sale exist it cannot be made anything else by calling it by a different name.

9th. That if the contract with W. B. L. was merely colorable, not made in good faith, but intended to conceal the property from

SHERIFF—*Continued.*

the creditors of said W. B. L. in order to deprive them of his future earnings, the said delivery of said goods as far as the creditors of said W. B. L. were concerned vested the property in said goods, in said W. B. L., and the same could be taken on execution by his creditors. *Id.*

*See* BOND, 2.

## STATUTES.

1. By sec. 141 of the Code of Public Local Laws, Art. 8, it is declared, that "the Citizens of the Village of Port Deposit in Cecil County, are a body politic by the name of the President and Commissioners of the Village of Port Deposit, and as such may sue and be sued," &c.; then follow a number of sections defining the powers and duties of said municipal corporation. By the Act of 1872, ch. 347, these sections are *amended* and *re-enacted*, and by said amendment, it is provided that "the inhabitants of the Town of Port Deposit in Cecil County, are a Corporation by the name of President and Commissioners of Port Deposit, and by that name shall have perpetual succession, sue and be sued," &c. This Act contained no clause *expressly repealing* the sections of the Code above referred to. **Held:**

That the Act of 1872, effected no change in the corporate existence of the municipality, and that a judgment rendered in December, 1874, in a suit instituted against it prior to said Act by its old name was a valid judgment. *Watts vs. President, &c. of Port Deposit*, 506.

*See* ACTS OF ASSEMBLY.

## STOCKHOLDER.

1. In an action by the Academy of Music of Baltimore City, a body corporate, to recover from a subscriber to its stock an assessment or call on the shares subscribed by him, it appeared in evidence that D. was a well known merchant of Baltimore, who with others had undertaken the task of procuring subscribers to said stock, and as such being himself a subscriber and stockholder, had obtained the signature of the defendant to the contract of subscription given in evidence. The defendant offered in evidence certain representations made by D., under which he claimed to be released from liability under his subscription. On objection to the admissibility of this evidence, it was **Held:**

1st. That generally parol representations or agreements made at the time of subscribing for stock are inadmissible and void unless fraud is shown.

2nd. That the defendant not having added in writing to his signature, the terms of the representations, on the terms of which he

STOCKHOLDER—*Continued.*

claimed to have made his subscription, he cannot be allowed to add by parol testimony, other conditions to the terms of his written contract. *Scarlett vs. Academy of Music*, 132.

2. The evidence showed that the board of directors of said corporation, on the 7th of October, 1870, passed a resolution, that in case the committee previously appointed for that purpose, should conclude the purchase of a site for the building, the treasurer should notify the subscribers, that the first instalment of forty per cent. would be payable on a day to be fixed by the president, within thirty days thereafter, at the F. & M. Bank, and at the meeting of the board on the 31st of October, 1870, the committee reported the purchase and the treasurer reported that he *had called* the assessment *as directed*, payable on the 10th of November, following. The notice of this call purporting to have been signed by the treasurer, was in effect as follows: "The stockholders of the Academy of Music of Baltimore City are hereby notified that the first instalment of forty per cent. will be due and payable on the 10th inst., (to-morrow,) at the National Farmers' and Merchants' Bank," and it was proved that this notice was published in a newspaper printed in Baltimore City, on the 9th and 10th of November, 1870. HELD :
  - 1st. That from this, and the other evidence in the case, it was competent for the jury to find that the call was duly made by the board of directors, that C. was the then secretary of the corporation, and was duly authorized to give the newspaper notice of the call, that the time and place of payment was fixed and designated by the board of directors, and that such designation of time and place was in accordance with the resolution of the board of the 7th of October, 1870.
  - 2nd. That under section 65 of the Act of 1868, ch. 471, which is substantially a re-enactment of sec. 49 of Art. 26 of the Code, it is immaterial whether the notice by publication required by those sections to entitle a corporation to sue its subscribers for assessments, be published for only one or for any number of days before the time of payment mentioned in it.
  - 3rd. That all that the law requires, is that the notice shall be given by publication in a newspaper printed nearest the place where the principal office of the corporation is located, and one such publication before the day fixed for payment is sufficient. *Id.*
3. By the terms of the contract of subscription which the defendant signed, he agreed to subscribe for stock in the "Baltimore Academy of Music." The corporate name of the plaintiff was, "The Academy of Music of Baltimore City," and the declaration averred that the "Bal-

STOCKHOLDER—*Continued.*

timore Academy of Music" mentioned in the contract was the plaintiff, and that the contract was intended to be, and was in fact, made with the plaintiff. The proof showed that there was no other corporation in the City of Baltimore, which could possibly set up any pretence to this subscription, that all the subscriptions were taken like this in the name of the "Baltimore Academy of Music," and that when the enterprise was started it was commonly known by that name. **Held:**

- 1st. That this was quite sufficient to authorize the jury to find the averments of the declaration to be true, and that the defendant in fact subscribed, and in fact intended to subscribe for shares of the capital stock of the plaintiff, under the name of the "Baltimore Academy of Music."
- 2nd. That the obligation of the defendant rested upon the terms of the contract, and it matters not whether the person who solicited him to sign it, was a mere volunteer in obtaining subscriptions, or was expressly authorized so to do by the corporation. *Ib.*
4. The condition of the subscription was, that it was "not to be binding until stock amounting in the aggregate at par, to \$200,000, shall be subscribed." **Held:**

That the true construction of this condition was, that the subscriptions should be binding on every subscriber when that sum was subscribed, and the amount to be subscribed by each one, whether he might be the party sued or not, was to be included in making up the aggregate amount. *Ib.*

## STREETS.

*See* BALTIMORE CITY, 1, 2, 3.

WAYS, 1, 2, 3.

## SUBSCRIPTION.

*See* STOCKHOLDER, 3.

## SURETIES.

1. To entitle a surety to an assignment and execution against his co-sureties under sec. 7 of Art. 9, of the Code, vol. 1, it is incumbent upon him not only to satisfy the judgment, but to pay the *whole amount* of it. *Wilson, et al., Adm'rs vs. Ridgely, et al.*, 235.
2. Whilst it is an undoubted proposition, that the liability of the surety is not to be extended by implication beyond the terms of his written contract, by which his responsibility is to be measured, the bond constituting such contract must have such construction given to it as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other. *Engler vs. People's Fire Ins. Co.*, 322.



SURETIES—*Continued.*

3. In an action against a surety, the record of a judgment against his principal, unless shown to be on account of matters connected with his guaranty, is inadmissible. But where the record shows a liability embraced by the guaranty of the surety, it is *prima facie* evidence for that purpose. *Roberts, et al. vs. Woven Wire Mattress Co.*, 374.
4. On the 26th of April, 1870, R. wrote a letter to the M. Co. stating his intention to take the agency of the Co., and that his brother would be offered as surety for the performance of his obligations. On the 12th of May, 1870, a contract of agency between R. and the Co. was perfected, and on the 21st of May, 1870, a bond of indemnity was executed by his brother as guarantor. In a suit by the Co. against the guarantor on the bond, it was HELD :  
That as a preliminary step towards a final arrangement, if made out to the satisfaction of the jury, between R., the Co., and the guarantor, the letter was a constituent part of the transaction, and was admissible in evidence. *Ib.*
5. Where a party has given a bond to another to secure the faithful performance of the contract of a third person, it is the duty of the obligee to give reasonable notice to the guarantor of any defalcation on the part of the contractor. It is the prerogative of the Court to define the character of the notice, and the duty of the jury to determine whether such reasonable notice has been given. *Ib.*
6. Where a guaranty is subsequent to the contract between the principal and the guarantee, and forms no part of the consideration thereof, it requires a distinct consideration to give it efficacy as a collateral undertaking. *Ib.*
7. But where a guaranty expressly referred to a previous agreement between the principal and the guarantee, which was executory in its character, and embraced prospective dealings between the parties; then the guaranty purports upon its face and by necessary construction a sufficient consideration. *Ib.*
8. Where a contract of guaranty was signed by the guarantor, and delivered to the agent of the guarantee, and was in the possession of the guarantee at the time of a suit upon the contract, and was produced by him; there is sufficient *prima facie* evidence of the delivery and acceptance of the contract of guaranty, and other notice of its acceptance is unnecessary, unless there had been a stipulation to that effect. *Ib.*
9. Where a guarantor warranted the faithful performance by his principal of certain duties stipulated in a contract, among which was the duty of making returns of sales; the failure by the guarantee to

## SURETIES—Continued.

notify the guarantor of his principal's default, and permitting the principal to make returns in a manner different from the stipulated mode, cannot afford sufficient evidence of the abandonment of the contract and the substitution of another. *Ib.*

10. Case where it was held that there was no evidence of the violation of a contract by one party thereto, sufficient to preclude him from recovering against the guarantor of the other party. *Ib.*
11. The payment by the principal, year by year, of the interest on a joint and several promissory note, will prevent the Statute of Limitations from attaching to the note in favor of the surety. *Schindel vs. Gates*, 604.
12. The rule on this subject, laid down in *Ellicott vs. Nicols*, 7 Gill, 86, has been the accepted law of this State for nearly thirty years, and in the absence of legislation to the contrary, it is not to be questioned. *Ib.*
13. Any valid contract or agreement between the creditor and the principal; or between the creditor and a surety without the concurrence of co-sureties, whereby the latter are subjected to an increased risk, operates as a discharge of such sureties. *Smith, et al. vs. Stote, use of County Comm'rs of Balto. Co.*, 617.
14. The release of one or more sureties without the assent of the co-sureties will operate *at law* to discharge the latter. *Ib.*
15. In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect, unless it subjects the co-sureties to an increased risk or liability. *Ib.*
16. As between themselves the sureties are liable only for their proportion of the debt, and the right of contribution does not exist unless they have paid an amount exceeding this proportion. *Ib.*
17. A judgment was recovered against several sureties and the executrix of P. a deceased surety. The rateable proportion due by each defendant in the judgment was afterwards ascertained, and the amount due by P. was paid, and the judgment entered satisfied as against his executrix. Execution having been issued on the judgment as against the other sureties, on a motion to quash the execution, it was HELD:
  - 1st. That the payment of P's proportion of the judgment, and the subsequent entry of satisfaction as against his executrix, could not in any manner affect the rights of the co-sureties, or subject them to an increased liability.
  - 2nd. That the effect of such entry, so far as they were concerned, was to release them from the payment of P's proportion of the judgment, and, should any of the co-sureties prove

SURETIES—*Continued.*

insolvent, to release the others from the payment of P's proportion of the loss arising from such insolvency.

3rd. That in summary motions of this kind Courts always exercise a *quasi* equitable jurisdiction, and will not therefore order an execution to be quashed if it appear, and upon a consideration of all the facts and circumstances of the case it would be, against well settled principles of equity. *Id.*

*See* ATTACHMENT, 1.

BOND, 1, 3.

ESTOPTEL, 1.

EXECUTORS, 1.

## SURPRISE.

*See* EQUITY, 2.

## SURRENDER OF POLICY OF INSURANCE.

*See* MORTGAGE, 5, 6.

## TAX.

*See* CORPORATIONS, 10.

## TELEGRAPH COMPANIES.

1. The Western Telegraph Company was incorporated by a special Act of Assembly, 1846, ch. 39, for a period of thirty years, and the Legislature reserved to itself the right to alter and amend the charter at pleasure. Shortly before the expiration of this charter, steps were taken by a majority of the stockholders to re-organize under the General Corporation Act of 1868, ch. 471. On a bill filed by a stockholder for an injunction to restrain this re-organization, it was  
HELD :

1st. That there was nothing in the Act of 1846, to prevent a majority of the stockholders from organizing under the Act of 1868.

2nd. That the reservation by the Legislature of the power to alter and amend its charter at pleasure, became part of the contract between the State and the corporators, and the exercise of it in no manner impaired the obligation of a contract within the meaning of the Constitution of the United States.

3rd. That the amended or substituted charter may be conferred by a special Act, or by a general law authorizing the corporation to organize under such general law; and if such amended or substituted charter is accepted by a majority of the stockholders, such acceptance is binding upon all the members of the corporation, unless the original purpose of the corporation be changed by such charter.

TELEGRAPH COMPANIES—*Continued.*

- 4th. That the alteration of the charter may be as lawfully made by the substitution of a new charter as by the amendment of the old, provided such substituted charter be germane, and necessary to the objects and purposes for which the company was organized.
- 5th. That the proposed organization under the Act of 1868, is not liable to the objection, that it will effect a radical and fundamental change, in the objects and purposes for which the original company was chartered.
- 6th. That the mere grant of additional powers auxiliary to the original design does not constitute such radical and fundamental change. *Sprigg vs. Western Telegraph Co., et al.*, 67.

## TENDER.

*See* MORTGAGE, 4, 5, 6.

## TERM.

*See* LEASE, 1, 2.

## TERRE-TENANTS.

*See* SCIRE FACIAS, 3.

## TESTIMONY.

*See* MALICIOUS PROSECUTION.

## TIME.

*See* ASSIGNMENT, 1.

ORPHANS' COURT, 4.

## TOLLS.

*See* FORFEITURE, 1.

INJUNCTION, 1.

## TRESPASSER.

*See* NUISANCE, 4.

## TROVER.

*See* SHERIFF, 2.

## TRUSTEE.

1. H. W. as life-tenant and trustee for certain *cestuis que trust* in remainder, filed a petition for, and obtained an order allowing him to apply a certain sum, part of the trust fund in his hands, for permanent improvements of a farm, provided no cause to the contrary was shown by a day named in the order. The order was duly served on the *cestuis que trust*, and no cause to the contrary was shown by them. The improvements were made, but no account thereof was presented to the Court, the trustee having died before a report was filed by him. On a bill filed by a new trustee against the executors of H.W., it was HELD:

TRUSTEE—*Continued.*

That it was too late to object to the authority of the Court to pass the order, as such objection ought to have been made when notice of the order was served upon the *cestuis que trust*. Or they ought to have appealed from the order within the time prescribed by law. *Woollen, Trustee vs. Frick & Golder, Ex'rs*, 231.

2. The order did not require the trustee to report the nature and character of the expenditures before they were made, but required that after making the improvements he should report the same to the Court, in order that the Court might see whether they had been made in conformity with its order. **HELD:**

That the failure of H. W. to report his proceedings under the order presented no ground for disallowing his executors such sum as they could show to have been properly expended by him under the order. *Ib.*

*See* BOND, 1.

GUARDIAN AND WARD, 1.

## TRUST.

*See* USES AND TRUSTS.

## ULTRA VIRES.

*See* CORPORATIONS, 7, 8.

## USER.

*See* NUISANCE.

## USES AND TRUSTS.

1. A resulting trust arises when one person buys an estate and pays the purchase money, but takes the deed in the name of the other person, in which case the trust results by construction in favor of the person who paid the money. *Keller vs. Kunkel*, 565.
2. The bill alleged that the complainant bought of H. and others, as trustees, at public auction, a tract of land. That not having the money to pay for it, he borrowed the amount of the defendant upon certain collateral securities; which having been paid or advanced by the defendant for him, he caused the deed for certain other considerations to be made to the defendant instead of himself. **HELD:**
  - 1st. That here all the conditions necessary to raise a resulting trust concurred.
  - 2nd. That if these facts were proved by parol, as they might be, a trust resulted by implication of law in favor of the person purchasing and paying. *Ib.*
3. The evidence showed that the purchase money paid to the trustee was loaned to the complainant by the defendant, and was paid by the defendant as agent for the complainant and for his use. **HELD:**

USES AND TRUSTS—*Continued.*

That the purchase money being thus advanced by the complainant through the defendant, the latter was a trustee of the former of the premises conveyed to him. *Ib.*

*See* WILLS, 1.

## USURY.

1. On a bill filed to restrain the execution of a judgment on the ground of fraud, it was HELD :

1st. That the complainant had not made out a case entitling him to have the judgment set aside.

2nd. That inasmuch as there appeared to have been usurious charges against him in the transactions between him and the defendants, he was entitled to have the judgment reduced to the sum found to be due by charging him with the net amount loaned him, and the average interest thereon, and allowing him for the amount of credits to which he was entitled, including bonus and interest on bonus.

3rd. That although it was quite probable that this method did not ascertain the precise amount of usury paid by the complainant, yet no more could be allowed him, as there was no proof in the record to justify the Court in allowing any more, owing to the defective manner in which the complainant had kept his accounts, and his own forgetfulness of matters material to their elucidation.

*Hill vs. Reifsnider, et al.*, 555.

## VARIANCE.

*See* PLEADINGS, 5.

## WAIVER.

*See* MECHANICS' LIEN, 1.

## WAYS.

1. The law is well settled that where a new way or road is opened or made across a way or road already existing and in use, the new way must be so constructed as to cause as little injury as possible to the old way or road. *Northern Central Railway Co. vs. Mayor, &c. of Balto.*, 425
2. Under proceedings by the street commissioners of the City of Baltimore, for condemning and opening North and Calvert streets, from John street to North avenue, the proof showed that the tracks of the Northern Central Railway Company at those points were laid, and their road was in use, some time before the said proceedings were commenced, and that the whole of its land was necessary for the tracks of its road, and that the situation of said tracks with reference to said streets was such, that the only mode in which the proposed streets could cross the tracks without great injury, both to

WAYS—*Continued.*

the company and the city, was by viaducts or raised ways of some description. **Held:**

That said streets must cross the land and tracks of the railway company by viaducts or raised ways so as to allow its trains to pass below. *Ib.*

3. In view of a proposed change in the route of said railroad within the city, an ordinance, (No. 77,) was passed September 26th, 1868, requiring the grades of certain named streets crossing the line of the new route of said railroad, to be raised *by the Mayor and City Council of Baltimore*, so as to enable the railroad company to construct its railway tracks under said streets, and providing that all open cuts along one of said named streets, "and other streets shall be tunnelled by the said railway company." **Held:**

- 1st That in construing this ordinance, the location of the railroad at the time, and its consequent inconvenience to the public, and disadvantage to the neighboring property holders, as well as the then condition of the streets of the city, and the topography of the ground, over or through which the new railway tracks were to be constructed and the streets of the city had been located and opened, or located only on the city plat, must be kept in view.

- 2nd. That as North and Calvert streets, so far as the railway company's property was concerned then existed only on the city plat, the said company had the right to use its property as if no such streets were contemplated by the city authorities, and to lay its railway tracks upon it.

- 3rd. That said ordinance should not be held to impose upon the railway company the burden of constructing and maintaining viaducts for North and Calvert streets, over its land and railway tracks, unless such be its plain language; and that the language used could not be held to refer to those streets.

- 4th. That the ordinance not having changed the rights and liabilities of the parties in respect to North and Calvert streets, they remained as they were at common law, as if the ordinance had never been enacted; and the viaducts for said streets over the land and railway tracks of the railway company, must be constructed and maintained by the city at its own cost and expense.

- 5th. That in the condemnation and opening of said streets, damages and benefits must be assessed to the railway company, with reference to the mode of crossing its lands and tracks by viaducts or raised ways. *Ib.*

*See* NUISANCE, 1, 2, 3.

## WILLS.

1. A resident of the City of Baltimore, died in the year 1873, leaving a will, by the first clause of which he bequeathed as follows: "I do hereby order and direct that the house and side lot where I now reside, situated \* \* \* \* be sold by my executors hereinafter named, as soon after my death as they may deem expedient and on such terms as they may think best; and I do hereby devise and bequeath the proceeds therefrom arising to the Magistrates and Town Council of the Royal Burgh of Dumfries, the County Town of Dumfrieshire, Scotland, to be paid over to them by my executors aforesaid, together with such rents and profits of said property as may accrue up to the time of said sale, and which said executors shall collect: in trust \* \* that they the said Magistrates and Town Council shall permanently invest said rents and profits and the proceeds of said sale in government stocks or in other safe and profitable securities, and pay over the interest and dividends of such investments as they accrue and are received to the High School of Dumfries which is under their direction and care, either by increasing the salaries of teachers, or providing scholarships. Or in such manner as may seem best to said trustees and most likely to promote the cause of education and elevate the standard of instruction in the said High School of Dumfries." The testator held only a leasehold interest in said property. Nearly a year before his death, the care and management of said school was transferred from the Magistrates and Town Council, and vested in the School Board for the Burgh by Act of Parliament. This transfer was without condition and absolute, and said School Board, with reference to all powers and duties in regard to said school then vested in the Town Council and Magistrates, was made to *supersede and come in the place* of said Town Council and Magistrates. The said School Board was by said Act duly incorporated, and the funds and revenues of said school were placed under its management. It was further provided by said Act, that "when in any Burgh, property or money *has been or shall be* vested in the Town Council, or in the Magistrates of any Burgh, or in any person or persons, *as trustees*, for the behoof of the Burgh School, or for the promotion of any branch of education in such school, or to increase the income of any teacher, the income or revenue of such property or money shall, as it accrues, *be accounted for and paid to the School Board*, of such Burgh, and shall be applied and administered *by the said Board* according to the trusts attaching thereto " And it was thereby further provided, that "it shall be lawful for the School Board, from time



## WILLS—Continued.

to time, with the sanction of the Board of Education, *to vary or depart from the said trusts* with a view to increase the efficiency of the Burgh Schools, by raising the standard of education therein or otherwise." **Held:**

- 1st. That at the time the will took effect, the Magistrates and Town Council, whom the testator made trustees of this fund, and charged with the duty of dispensing the income, had no power to pay over that income as the will directed, nor to exercise the *discretion* in its disposition which the will conferred upon them, and them alone.
  - 2nd. That the substitution of the provisions of the Act of Parliament in place of what the will directed in this respect, would change what the testator must be assumed to have considered an essential and important part of it, and in effect make a new will for him.
  - 3rd. That if the Act had not been passed, or had not taken effect until after his death this difficulty might not have arisen, but the question before the Court, must be determined by the state of facts and law existing when he died.
  - 4th. That if the clause was not *then* effective the rights of the residuary legatees or next-of-kin vested immediately and irrevocably.
  - 5th. That it may be, that the difficulty would be overcome in England by the provisions of the statute, 43 Elizabeth, ch. 4, respecting charitable uses, or by virtue of the powers which the Courts of Chancery in that country possessed before and independently of that statute. But the case must be decided upon the doctrines of Maryland law as established by our own judicial decisions, and by these neither that statute nor any such Chancery powers have ever been adopted as part of the law of this State, but have been uniformly denied and repudiated in every case in which an attempt has been made to have them recognized.
  - 6th. That the difficulty above stated was insuperable and conclusive against the validity of said clause of the will.
  - 7th. That as the decree below related to other matters which the appeal did not bring up for review, this Court must affirm that part of it only, which declared said clause of the will to be void.
- Provost, &c. of Dumfries vs. Abercrombie, et al.*, 172.
2. The will of a testator contained the following clause: "It is my will that the rest, residue and remainder of my estate, together with all my right and interest in and to the estate and property of my deceased wife H. R. shall be equally divided between my said daughter A. J.

## WILLS—Continued.

B. and the children of V. C." The testator left surviving him, his daughter A. J. B. and two grandchildren, the children of his deceased daughter V. C. There was nothing to be gathered from the other parts of the will showing an intention on the part of the testator, that his grandchildren were to be regarded in the distribution of the residue of his estate as a class taking by representation. **Held:**

That the said legatees by force of the language used took equally, and that the distribution between them was to be *per capita*.

*Brittain & Wife, vs. Carson, et al.*, 186.

3. A testatrix died in the year 1835, leaving a will dated June 24th, 1835, containing the following clause: "I also give and devise unto my daughter C. N. all my lands in the State of Maryland *during her natural life, and if she leave lawful issue*, then I give and devise the same *to the said issue in fee*; but should she die *without lawful issue*, then and in that case I give and devise the same to my other daughter A. B. wife of J. B. *during her natural life*, and after her death, *to the heirs of her body then living in fee*." C. N. died in the year 1871, unmarried and without issue. A. B. died in the year 1836, leaving surviving her, her husband J. B., who died in the year 1846, and two children, namely, a son T. B., who died in the year 1855, intestate, unmarried and without issue, and a daughter H. B. D., who was born in the year 1832, and married C. D. in the year 1856. On an ejectment brought by H. B. D. and C. D. her husband in the year 1875, against persons claiming under a conveyance in fee made by C. N. in the year 1849, it was **Held:**

- 1st. That C. N. took only a life estate in the lands devised.
- 2nd. That a decision made by Baltimore County Court, in a case in equity to which C. N. was a party, to the effect that C. N. took an estate in fee under said devise, did not bind the present plaintiffs, they not being parties to that proceeding, and making no claim through or under any person that was a party.
- 3rd. That the devise over to A. B. for life upon the dying of C. N. without lawful issue, was not void as being after an indefinite failure of issue.
- 4th. That said devise over was good as a contingent remainder.
- 5th. That whether A. B. took but an estate for life, or an estate tail, by force of the rule in *Shelley's Case*, was under the facts in the case unimportant to be decided, as in either case the plaintiffs under the admitted facts would be entitled to all the land claimed.

WILLS—*Continued.*

6th. That as the plaintiffs could have asserted no claim to the possession of the estate until after the death of C. N., (under whom the defendants claimed,) in the year 1871, they were not barred by adverse possession. *Timanus, et al. vs. Dugan, et al.*, 402.

## WRIT OF ERROR.

*See* APPEAL, 8.

*E. A. W.*







